EDITOR'S NOTE

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No. 84-1192-CSY
Status: GRANTED

Docketed:
January 23, 1985

Title: Texas, Petitioner
v.
Sanford James McCullough

Court: Court of Criminal Appeals of Texas

Counsel for petitioner: Sherred, Randall L.

Counsel for respondent: Laney, Mark, Blackburn, Jeff

Entry	Date	Note	Proceedings and Orders
1	Jan 23 1985	G	Petition for writ of certiorari filed.
2	Feb 27 1985		DISTRIBUTED. March 15, 1985
3	Mar 13 1985	P	Response requested. (Due April 12, 1985 - NONE RECEIVED)
4	Mar 30 1985		Application for stay filed (A-742), and order granting same by White, J., on April 2, 1985.
5	Apr 11 1985		Brief of respondent Sanford James McCullough in opposition filed.
6	Apr 15 1985		REDISTRIBUTED. April 19, 1985
8	Apr 11 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Apr 22 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	May 3 1985		REDISTRIBUTED. May 9, 1985
13	May 10 1985		REDISTRIBUTED. May 16, 1985
15	May 29 1985		Record requested (CJ)
16	May 30 1985		Record filed.
17	May 30 1985		Certified original record, (Scx), received.
18	May 31 1985		REDISTRIBUTED. June 6, 1985
19	Jun 10 1985		Petition GRANTED.
			**********
21	Jul 5 1985		Order extending time to file brief of petitioner on the merits until August 5, 1985.
22	Jul 15 1985	N	Motion of respondent for appointment of counsel filed.
23	Jul 31 1985		DISTRIBUTED. Sept. 30, 1985. (Above motion).
25	Aug 6 1985		Order extending time to file brief of petitioner on the merits until August 12, 1985.
26	Aug 5 1985		Joint appendix filed.
27	Aug 5 1985		Brief of petitioner Texas filed.
28	Aug 12 1985		Brief amicus curiae of United States filed.
30	Sep 6 1985		Order extending time to file brief of respondent on the merits until September 27, 1985.
31	Sep 27 1985	G	Motion of John Mann, Esquire, to permit Jeff Blackburn, Esquire, to present oral argument pro hac vice on behalf of respondent filed.
32	Sep 27 1985		Brief of respondent Sanford James McCullough filed.
33	Oct 15 1985		Motion of John Mann, Esquire, to permit Jeff Blackburn, Esquire, GRANTED.
34	Oct 18 1985		CIRCULATED.
35	Oct 22 1985		SET FOR ARGUMENT, Tuesday, December 10, 1985. (2nd case).
36	Dec 10 1985		ARGUED.

84-1198

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TEXAS,
Petitioner
vs.
SANFORD JAMES McCULLOUGH,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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48 pp

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment require application of the presumption of judicial vindictiveness stated in *North Carolina v. Pearce*, 395 U.S. 711, or is such presumption rebutted, in a jurisdiction where the defendant has the right to elect to have either the jury or the judge assess punishment, under the following facts:

(1) Defendant elected to have the jury assess punishment at his first trial;

(2) Defendant filed a Motion for New Trial which was granted by the presiding judge;

(3) Defendant elected at his second trial to have the same presiding judge determine his punishment;

(4) The same presiding judge assessed greater punishment than the jury assessed at the first trial;

(5) The same presiding judge filed Findings of Fact and Conclusions of Law stating reasons based on evidence first heard at the defendant's second trial, for assessing the greater punishment?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

THE STATE OF TEXAS
Petitioner,

vs.

SANFORD JAMES McCULLOUGH
Respondent

PETITION FOR WRIT OF CERTIORARI,

CRIMINAL CASE

Petitioner, the State of Texas, respectfully requests that a Writ of Certiorari issue to review the Decision and Judgment of the Court of Criminal Appeals of Texas in the case of the *State of Texas* v. *Sanford James McCullough*, Number 351-83 in that Court, by which it affirmed that part of the Judgment of the Seventh Court of Appeals of Texas, which struck down the trial judge's assessment of greater punishment (50 years) at a second trial than the jury assessed (20 years) at Respondent's first trial; conclusively presuming judicial vindictiveness by the trial judge after that trial judge who presided at the first trial had granted Respondent's Motion for New Trial without an appeal, even though the Respondent had selected that judge instead of the jury to assess his punishment at his second trial; and the same judge, upon assessing greater

punishment gave substantive reasons, based upon evidence at Respondent's second trial, for doing so, those reasons being a part of the record. In that action of the Court of Criminal Appeals from which this relief is sought, that court did not follow this honorable court's rule announced in *Wasman v. United States*, 468 U.S. _____, 82 L.Ed2d 424, 104 S. Ct. _____.

OPINIONS BELOW

The Opinion dated February 3, 1983, of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in its Cause No. 07-81-0141-CR, reversing the trial court as to sentencing and reforming the Respondent's punishment in this cause to the 20 years originally assessed by the jury at his first trial, is reproduced in the Appendix as Appendix "A". It is not yet reported, but is in the process of being reported.

The Opinion dated March 18, 1983, of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in the same cause, on the State's Motion for Rehearing, overruling this Petitioner's Motion for Rehearing is reproduced in the Appendix as Appendix "B". It is not yet reported, but is in the process of being reported.

The Opinion of the Texas Court of Criminal Appeals, in this same cause, but numbered 351-83 in that Court, on Discretionary Review, delivered December 7, 1983, is reproduced in the Appendix as Appendix "C". It is not yet reported, but is in the process of being reported.

The Opinion of the Texas Court of Criminal Appeals in this cause, under its same cause number, on the State's Motion for Rehearing on Petition for Discretionary Review was delivered December 5, 1984, and is reproduced in this Appendix as Appendix "D". It is not yet reported, but is in the process of being reported.

JURISDICTION

Within the time allowed by applicable rules and statutes this matter was presented to the Texas Court of Criminal Appeals by the State, as Petitioner, seeking Discretionary Review. The Court of Criminal Appeals of Texas granted Discretionary Review of the decision of the Amarillo Court of Civil Appeals [The Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo]. That Court rendered its original opinion, and thereafter granted Petitioner's Motion for Rehearing. Upon granting Rehearing, the Court of Criminal Appeals took under advisement the relief for which this Writ is sought. On December 5, 1984, the Court of Criminal Appeals delivered its final Opinion herein [Appendix "D"] concerning the question at bar. Petitioner, on that same date, December 5, 1984, filed with the Texas Court of Criminal Appeals its Motion to Stay Execution of Mandate, which had not been acted upon at the time of this writing. Also, on December 5, 1984, Petitioner filed its Second Motion for Rehearing and motion for leave to file the same with the Court of Criminal Appeals. The court has not acted upon the Second Motion for Rehearing nor on the Leave to file the same. Therefore, it is an appropriate presumption that the action of the Court of Criminal Appeals on December 5, 1984, is final. There is no statutory privilege to file a second Motion for Rehearing, although the Court of Criminal Appeals is possessed of power to grant the same. Relief under the Constitution is sought from the December 5, 1984, action of the Texas Court of Criminal Appeals. Petitioner has raised the same issue, indicated above in the Question Presented, at every level and stage of these proceedings. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

Article 37.07, Code of Criminal Procedure of Texas, expresses the Statutory Requirements regarding the as-

sessment of the penalty upon conviction in criminal cases. Essentially it provides for a bifurcated trial, with the finding of guilt or innocence being the first duty of the jury, with Section 2(b) thereof providing it to be the responsibility of the judge to assess the punishment applicable to the offense; however, that statute in Section 2(b)(2) permits the defendant to make a written election at the time he enters his plea in open court, to choose as the determiner of his punishment that same jury which determined his guilt or innocence. If no election is made, then the trial judge is required to assess punishment.

Article 37.07, Texas Code of Criminal Procedure is reproduced in the Appendix as Appendix "E".

CONSTITUTIONAL PROVISION AT ISSUE

Amendment XIV of the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In September 1980, in a two-part trial, the Respondent was found guilty by the jury of murder. Thereupon, he selected the jury to assess his punishment as he is permitted to do under Article 37.07, Texas Code of Criminal Procedure (Appendix "E"). The jury assessed his punishment at 20

years confinement. Within the statutory time, Respondent (defendant) filed his Motion for New Trial to the same court and same judge that conducted his first trial. In his Motion he alleged that the trial judge erred in not granting his motions for mistrial during the first trial, asserting improper jury argument by the prosecution and also asserting improper cross-examination by the state of a defense witness. That same trial judge granted Respondent's Motion for New Trial. Upon re-trial before that same Judge, another jury again found Respondent guilty of murder. Under the Statute quoted in Appendix "E", [Article 37.07, Texas Code of Criminal Procedure,] the Defendant, (Respondent herein) did not elect this time in writing to have the jury assess his punishment, the effect of which was to choose the trial judge to determine the penalty for the murder for which the jury had convicted him. At the end of a hearing on punishment following the second trial, the trial judge assessed Respondent's punishment at 50 years confinement. Thereafter, upon motion of the Respondent, the trial judge prepared and filed in the record Written Findings of Fact and Conclusions of Law [Appendix "F" herein]. By those findings the judge expressed a number of reasons, supported by evidence first heard at the defendant's second trial, for determining and assessing greater punishment than the jury had assessed at the first trial. [Those reasons are set forth in Appendix "F".]

The defendant (Respondent herein), by assignment of error, raised the unconstitutionality of the second sentence on the ground that the Judge's assessment of 50 years confinement, after the jury in the first trial had assessed 20 years confinement, violated the rule in *North Carolina v. Pearce, 395* U.S. *711*, even though the jury and not the Judge determined the first sentence, and even though the Judge expressed in the record her reasons, based primarily on evidence first heard at respondent's second trial, for determining the greater penalty at the second trial. Those reasons indicated clear reasons to find a complete absence of vindictiveness on the part of the judge.

On that appeal by Respondent, the Amarillo intermediate Appellate Court, [Court of Appeals for the 7th Supreme Judicial District of Texas] found that the increased punishment assessed by the judge at the second trial violated the principles of *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed2d 656 (1969). Our case at bar differs from Pearce because: (1) The jury had assessed the original punishment at the first trial because of written pleadings of Respondent selecting the jury to make the assessment (2) The second trial occurred because the trial judge who presided at both trials granted the Respondent's Motion for New Trial; (3) By not selecting the jury to assess punishment at the second trial, the Respondent, through a Texas Rule of Procedure, forced the determination of his punishment at the second trial upon the trial judge; (4) The trial judge, following determination and assessment of punishment, filed in the record written reasons for determination and assessment of greater punishment than the jury assessed at the first trial. All of the enumerated factors set forth above are elements that distinguish this case from the facts of *North Carolina v. Pearce*, cited above. Both the Court of Appeals and the Texas Court of Criminal Appeals declined to recognize these distinctions.

The reasons appearing in the record of this case, given by the trial judge, (Appendix "F") for imposing a greater sentence than did the jury at the first trial, indicate primarily information that came to the judge's attention from evidence adduced at the second trial itself, including, but not limited to the demeanor and actions of the Respondent at his second trial, consistent with the language of the Supreme Court in the *North Carolina v. Pearce* opinion and in its recent *Wasman v. United States* opinion. For emphasis and greater facility in referring to the reasons expressed by the trial judge for assessing greater punishment the same are reproduced in the Appendix at Appendix "F".

REASONS FOR GRANTING WRIT

I.

IF THE FACTS RELATED IN THE QUESTION PRESENTED CREATE A PRESUMPTION OF JUDICIAL VINDICTIVENESS UNDER THE HOLDING OF THIS COURT IN *NORTH CAROLINA* V. *PEARCE* 395 U.S. 711, THEN THAT PRESUMPTION IS REBUTTED ACCORDING TO THE RATIONALE OF THIS COURT IN *WASMAN* V. *UNITED STATES*, No. 83-173-468, U.S. _____, 82 L.Ed.2d 424, 104 S. Ct. ____, AND THE TEXAS COURT OF CRIMINAL APPEALS HAS FAILED TO FOLLOW THIS HONORABLE COURT'S MANDATE AS STATED IN *WASMAN* AS TO THE REBUTTING OF SUCH A PRESUMPTION.

The constitutional question raised herein was initially raised by Respondent through assignment of error from the trial court to the intermediate Texas Appellate Court called The Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo. When decided contrary to the State's prayers in that appeal, the question was raised by the State in its Petition for Discretionary Review to the Texas Court of Criminal Appeals, the highest Texas Criminal Appellate Court. That Court summarily rejected the position herein urged by the Petitioner, and then, on Motion for Rehearing, re-considered its decision, and decided to, and did, write on the subject, finally concluding that to find in favor of this Petitioner would transgress the "prophylactic rule", presuming judicial misconduct, which that Court held to have been announced by the United States Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969). Petitioner contends that its position herein is consistent with the later clarification of the rule announced by this court in *Wasman v. United States*, 468 U.S. _____, 82 L.Ed 2d 424, 104 S. Ct. _____. If Petitioner's position announced herein is not consistent with *Wasman*, then the ruling of this Court in both cases is distinguishable from, and should be distinguished now by this court from the circumstances that exist in our case at bar. There is a strong need in the several states jurisdictions having statutes and procedural sentencing rules similar to those of Texas (empowering defendant to select between jury and judge as the sentencing agent) for a clarification of the constitutional law applicable to situations such as our courts have found and will find themselves facing. In such jurisdictions, the result is that a defendant upon retrial sets his own range of punishment, putting a cap on the upper limit of the possible punishment he might receive, thereby emasculating the State legislature's intent as to what the full punishment range should be.

II.

APPLICATION BY THE TEXAS COURTS OF THE *PEARCE* RULE IN THE CIRCUMSTANCES OF THE INSTANT CASE HAS LEFT NO ROOM WITHIN WHICH ANY TRIAL JUDGE CAN INVOKE HIS OWN STANDARDS, PRINCIPLES, AND INDIVIDUALITY, OR APPLY HIS OWN CONSCIENTIOUS DETERMINATION AND APPLICATION OF A JUST SENTENCE IN ANY SECOND TRIAL IN THE ABSENCE OF FURTHER MISCONDUCT OF A DEFENDANT BETWEEN THE TIMES OF THE TWO TRIALS.

Wasman v. *United States* 82 L.Ed2d 424, was mentioned in a footnote of the Opinion of the Court of Criminal Appeals in the instant case (Appendix "D" Page A-12); but

the conclusions in *Wasman* were either misunderstood or ignored by the Court of Criminal Appeals. *Wasman* has clarified the holding in *Pearce*. In effect, *Wasman* announced that a trial court will not be limited, in a determination of misconduct by a defendant, to conduct occurring after his first trial, as proof that a re-sentencing judge, in imposing a greater sentence at a second trial, was not motivated by any vindictiveness or retaliatory attitude. Instead, Wasman indicates that a trial judge may consider, upon resentencing, events that cast additional light upon the defendant's life, health, habits, conduct, and mental and moral propensities as rebutting the presumption of vindictiveness; but that such events need not be confined to subsequent misconduct of a defendant that occurred later than his first trial.

The essence of the holding in *Wasman* is that if the resentencing authority expresses valid reasons supporting a greater sentence than was assessed in the first trial, then such greater sentence is constitutionally sound.

The opinion of the Texas Court of Criminal Appeals indicates that Wasman was either not considered, not followed, or not understood. That Court did not consider any of the circumstances found by the trial judge to exist from the record during the re-trial of this case that would permit the trial judge's actions in assessing a greater punishment to be cleansed from presumption of vindictiveness required by the Pearce opinion. Instead, the Court of Criminal Appeals fell under the same misunderstanding of the rule in Pearce as did the Amarillo Court of Appeals whose opinion it reviewed and affirmed. This misunderstanding of the gravaman of *Pearce* is indicated in the Footnote to the opinion of the Court of Appeals written by Associate Justice Richard Countiss, being the footnote appearing on page A-7 of Appendix "A" where the Amarillo Court of Appeals said:

"This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although these matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant."
[Page 6 of the Opinion]

Thus, we are now faced, before this court, with circumstances in which both of the appellate steps through the Texas Courts below have resulted in a clear indication of a misunderstanding and a misapplication of the *Pearce* rule as clarified in *Wasman*.

The prophylactic, narrow, *Pearce* rule should not be applied under circumstances in which a jury has determined the guilt and sentence in the first trial, and the trial judge has conceded that there was error meriting a second trial and granted a new trial; and then, the trial judge, when selected by a defendant to administer his punishment following a second guilty verdict, be presumed to be motivated by vindictiveness in every occasion wherein a more severe penalty is assessed. Having been placed in such a position of presumed vindictiveness upon any increasing of the sentence, a trial judge should be permitted to rebut the *Pearce* presumption if his findings indicate sound, substantial, and credible reasons for such determination of sentence. To stifle the sentencer's own princi-

ples, individuality, and conscience under such circumstances is to distort the intention of the due process clause of the fourteenth amendment to the Constitution.

In *Wasman* v. *United States*, this court eruditely pointed out that the holding in North Carolina v. Pearce is contradictory and conflicting. On page 668 of the Pearce Opinion, found in U.S. Supreme Court Reports, in Section II-C of that opinion this court said:

> "We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in order words, from imposing a new sentence, whether greater or less than the original sentence, IN THE LIGHT OF EVENTS SUBSEQUENT TO THE FIRST TRIAL THAT MAY HAVE THROWN NEW LIGHT UPON THE DEFENDANT'S LIFE, HEALTH, HABITS, CONDUCT, and MENTAL AND MORAL PROPENSITIES."
> [emphasis ours]

It is that which is quoted above herein that was grasped by this Court in Wasman as the true holding of the court in *Pearce*. That holding does not impose the improper restrictions set forth by the Texas Court of Appeals under circumstances such as ours. It should be announced by this Court in an opinion on the question posed herein that no such restrictions were intended by the due process clause of the fourteenth amendment to be imposed upon the several states in such circumstances as those at bar in this case. It cannot be denied that the holding in Pearce quoted above is much more reasonable under the constitution than a holding that restricts a trial judge in the imposition of a sentence only to a consideration of improper conduct actually committed by a defendant later than his first trial.

The holding, quoted above, from *Pearce*, is distinctive from the interpretation placed thereon by the Texas Court of Appeals and the Texas Court of Criminal Appeals. On the same page as the above quotation from Pearce, that opinion continues to direct as follows:

> "Such information [as a basis for a more severe resentence] may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, *or possibly from other sources* [emphasis added].

The Pearce opinion utters a rather broad assertion that "due process requires that a defendant be freed of apprehension of any retaliatory motivation on the part of the sentencing judge". Petitioner submits that perhaps the writer of the opinion would have better said that the rule should be — and we submit that such a rule, in effect, was announced in the *Wasman* opinion —

> That the constitution should not be held to require a judge to free a defendant from misapprehension; only that a judge himself or herself must be free from any guilt of retaliatory or vindictive motivation in determining what punishment should fit the crime for which the defendant has been found guilty, based upon that judge's principles, training, experience, and judgment.

Wasman indicates that such freedom from vindictive motivation must appear from the record. We submit that our circumstances together with our record in the case at bar accomplishes that required freedom.

The requirements of *Wasman* can be accomplished by the re-sentencing Judge carefully assigning reasons for the increased punishment, freed from the chronological and substantive limits of considering only a defendant's conduct between two trials. Application of this rule is especially important in a jurisdiction allowing a judge or jury assessment of punishment, to insure that a defendant cannot forever set his own range of punishment in subsequent trials.

III.

UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT A PRESUMPTION OF JUDICIAL VINDICTIVENESS SHOULD NOT ARISE

(1) IN A CASE WHERE A DEFENDANT, UNDER THE AUTHORITY OF PROCEDURAL RULES, ELECTS ONE SENTENCING AUTHORITY (A JURY) TO ASSESS HIS PUNISHMENT UPON CONVICTION AT HIS FIRST TRIAL, THEN AT A RE-TRIAL HE ELECTS ANOTHER SENTENCING AUTHORITY (THE JUDGE) TO RESENTENCE HIM, WHEREUPON THE JUDGE DIRECTS GREATER PUNISHMENT THAN THE JURY DID.

(2) HOWEVER, IF IN SUCH CIRCUMSTANCES SUCH A PRESUMPTION OF VINDICTIVENESS DOES ARISE, THEN THE JUDGE WHO ASSESSES GREATER PUNISHMENT SHOULD NOT BE LIMITED, IN REBUTTING SUCH A PRESUMPTION, TO A CONSIDERATION ONLY OF EVENTS IN THE LIFE OF THE DEFENDANT THAT OCCURRED LATER THAN THE FIRST TRIAL, FROM WHICH

TO EXPRESS HIS CONSTITUTIONAL REASONS FOR INCREASING THE PUNISHMENT OVER THAT ORIGINALLY ASSESSED BY THE JURY IN THE FIRST TRIAL.

(3) SUCH A RULE, AMONG OTHER EVILS, EXPOSES A DEFENDANT TO BEING PUNISHED, IN PART, FOR CONDUCT LATER THAN, AND UNRELATED TO, THE OFFENSE FOR WHICH HE WAS TRIED, CONVICTED, AND SENTENCED.

On page 431 of the *Wasman* opinion in 82 L.Ed2nd, the court said:

> "Because of its "severity" this court has been chary about extending the Pearce presumption of Vindictiveness when the likelihood of vindictiveness is not as pronounced as in *Pearce and Blackledge*".

In *Blackledge* v. *Perry*, 417 U.S. 21, referred to in the preceding paragraph hereof, the Court struck down a re-indictment by the prosecutor following the defendant's successful appeal, under circumstances where the prosecutor sought and obtained an indictment for a felony offense in order to proceed to a second trial seeking greater punishment, when the first trial had been for a misdemeanor providing for a much smaller range of punishment to be assessed against that defendant. Even there, this court expressed, in the recent *Wasman* opinion, that an acceptable explanation from the prosecutor in the record for his action may have rebutted the presumption of vindictiveness. It is clear that within the range of strong indicia of vindictiveness, the *Blackledge* case carries far greater bases for that presumption than any indicated in our case at bar. But, even in *Blackledge* this court did not demand post-first-trial misconduct by the defendant to

serve as an acceptable basis for such prosecutorial or judicial actions.

Page 433 of the opinion in *Wasman* contains a significant expression by this court relating to this third reason why our Writ should be granted by this court. It is quoted as follows:

> "If it was not clear from the court's holding in *Pearce* it is clear from our subsequent cases applying *Pearce* that DUE PROCESS DOES NOT IN ANY SENSE FORBID ENHANCED SENTENCES OR CHARGES, BUT ONLY ENHANCEMENT MOTIVATED BY ACTUAL VINDICTIVENESS TOWARD THE DEFENDANT FOR HAVING EXERCISED GUARANTEED RIGHTS. IN *PEARCE* AND IN *BLACKLEDGE*, THE COURT "PRESUMED" THAT THE INCREASED SENTENCE AND CHARGE WERE THE PRODUCTS OF ACTUAL VINDICTIVENESS AROUSED BY THE DEFENDANT'S APPEALS. IT HELD THAT THE DEFENDANT'S RIGHT TO DUE PROCESS WAS VIOLATED NOT BECAUSE THE SENTENCE AND CHARGE WERE ENHANCED, BUT BECAUSE THERE WAS NO EVIDENCE INTRODUCED TO REBUT THE PRESUMPTION THAT ACTUAL VINDICTIVENESS WAS BEHIND THE INCREASES. IN OTHER WORDS, BY OPERATION OF LAW, THE INCREASES WERE DEEMED MOTIVATED BY VINDICTIVENESS."

With reference to the foregoing expression by the Supreme Court, our circumstances at bar are so vastly different from either *Blackledge* or *Pearce*, that such presumptions

of vindictiveness should either not be permitted to apply in our circumstances, or if they are so permitted, then the errors of our Texas Courts in interpreting the Pearce Rule should be corrected by what has been held in *Wasman*. Essentially, the errors in demanding only post-first-trial misconduct to serve as the basis for acceptable reasons for increased re-sentencing by trial judge following jury first sentence are clearly indicated in the opinion in *Wasman*. This is further revealed in the following portion of the *Wasman* opinion found on Page 435 of 82 L.Ed 2d:

> "There is no logical support for a distinction between events and conduct of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned.

The *Wasman* opinion cited *Williams* v. *New York*, 337 U.S. 241 in which the opinion declares that "the underlying philosophy of modern sentencing is to take into account the person as well as the crime by considering information concerning every aspect of a defendant's life.

We submit that our case at bar, as did the *Wasman* case

> "squarely presents a question of the scope of information that may be relied on by a sentencing authority to justify an increased sentence after retrial. . . ."

CONCLUSION AND PRAYER

Petitioner believes that this court should, and prays that it will apply the distinctions expressed in the *Wasman* decision, which have clarified the rule in *Pearce*, to correct the misunderstandings of the lower courts regarding judicial vindictiveness as well as the constitutional requirements for rebutting a presumption thereof where circum-

stances create such a presumption. Consequently, petitioner asks that a Writ of Certiorari issue to review the decisions of the Court of Appeals for the 7th Supreme Judicial District of Texas and the Court of Criminal Appeals of Texas.

Respectfully submitted,

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APPENDIX

Appendix "A"

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AMARILLO
PANEL C
FEBRUARY 3, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

Appellant was convicted of murder, § 19.02, Tex. Penal Code Ann. (Vernon 1974), and sentenced to 50 years in the penitentiary. He contends the trial court erred when it (1) refused to grant his motion for change of venue, (2) admitted bloody photographs of his victim, and (3) imposed a greater sentence on retrial than was imposed by the jury when appellant was first tried for the crime. We reform and affirm.

In September, 1980, appellant was convicted of murder and assessed 20 years in the penitentiary by a jury. Subsequently, appellant's motion for new trial was granted and he was tried again in December, 1980. At the second trial, the question of guilt was again tried before a jury, but appellant permitted the trial judge to assess punishment. The judge, who had also presided at the first trial, assessed 50 years in the penitentiary.

In the interim between the first and second trial, appellant moved for a change of venue under art. 31.03, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), with supporting affidavits, alleging that there was so great a prejudice against him in the county that he could not obtain a fair trial. The State controverted the motion and the trial court heard evidence from various witnesses. The State presented evidence that appellant could receive a fair trial in the county and appellant presented evidence that he could not. Appellant also introduced evidence of news media coverage of the crime and his first trial and conviction. The trial court's denial of his motion is the basis for his first ground of error.

Where, as here, the propriety of a change of venue is contested, the trial court's resolution of the dispute on its merits after a hearing will be reversed only if the court abused its discretion. McManus v. State, 591 S.W.2d 505, 516 (Tex. Cr. App. 1980). When conflicting evidence on the issue is presented, the court seldom abuses its discretion by denying the motion, Chappell v. State, 519 S.W.2d 453, 457 (Tex. Cr. App. 1975), even if the case has been publicized by the news media. Morris v. State, 488 S.W.2d 768, 771 (Tex. Cr. App. 1973).

In this case, we find no error in the denial of the motion. Credible conflicting evidence was presented and the trial court resolved the conflict against appellant. By doing so, it did not abuse its discretion. Ground of error one is overruled.

By his second ground, appellant contends the trial court erred in admitting seven photographs. The color photographs depict the victim's cuts and wounds and the murder scene, the victim's bedroom, in vivid and gruesome detail.

Appellant advances two arguments against the admissibility of the photographs. First, he says, they were not material because the defense stipulated that the victim was stabbed to death. Second, assuming some of the photographs were admissible, appellant argues that others were cumulative, and introduced only to inflame and prejudice the jury.

In Martin v. State, 475 S.W.2d 265, 267 (Tex. Cr. App. 1972), the general rule for admission of photographs in a criminal case is stated:

> We hold that if a photograph is competent, material and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to arouse the passions of the jury, unless it is offered solely to inflame the minds of the jury. If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible.
> (Footnotes omitted.)

Accord: Terry v. State, 491 S.W.2d 161, 163 (Tex. Cr. App. 1973).

The trial court did not abuse its discretion by admitting the photographs. First, the appellant cannot, by stipulating the cause of death, deprive the State of the duty and function of presenting all relevant evidence to the jury, "nor avoid facing the full facts of the crime." Harrison v. State, 501 S.W.2d 668, 669 (Tex. Cr. App. 1973).

Likewise, we do not agree that some of the photographs were merely cumulative and used solely to inflame and prejudice the jury. The photographs are extremely unpleasant to observe, but that does not make them inadmissible. Martin v. State, *supra*. The first four depict the victim or the scene from different angles and perspectives and aid the fact finder in understanding what occurred at the scene. The last three show the victim after the blood had been cleaned off the body, and aid the fact finder in understanding the medical testimony. Thus, each photograph is material, competent and relevant, depicts matters verbally describable, and clarified or aids in the understanding of other evidence. Ground of error two is overruled.

By his third ground, appellant attacks the punishment assessed on retrial. After the jury assessed twenty years imprisonment in his first trial, appellant moved for a new trial and the State, apparently unhappy because only twenty years was assessed, agreed with the appellant that a new trial should be granted. The trial court then granted the motion. Upon retrial, appellant permitted the trial judge to assess punishment and she assessed 50 years imprisonment. In this court, appellant says the increased punishment violates the constitutional principles stated in North Carolina v. Pearce, 395 U.S. 711 (1969). We agree.

In *Pearce*, the Supreme Court found no constitutional impediment *per se* to the imposition of greater punishment on retrial of a defendant. It was concerned, however, with the possibility that greater punishment on retrial would be assessed solely to penalize a defendant who had successfully sought a new trial. To prevent that occurrence, the Court established a new rule for state courts, in the following language:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant *be freed* of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

395 U.S. at 725. (Last emphasis added.)

Later, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Supreme Court limited *Pearce* to cases where the judge determines punishment, by holding that a jury can impose greater punishment upon retrial "so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness." 412 U.S. at 35.[1]

[1] Although *Pearce* places the burden on the trial judge to prove that greater punishment on retrial was based on post-first-trial acts by the defendant, and was not the result of vindictiveness, (and conclusively presumes vindictiveness unless the sentence is properly justified), 395 U.S. at 725, *Chaffin* places the burden on the defendant to prove that the retrial jury was vindictive. 412 U.S. at 35.

As it must, our Court of Criminal Appeals has followed *Pearce* and Chaffin. In State v. Miller, 472 S.W.2d 269 (Tex. Cr. App. 1971), it held that a judge imposed penalty of 99 years, given on retrial after the jury in the first case had assessed 40 years, was illegal when not supported by the affirmative justification required by *Pearce*. It applied the same rule and found unassigned error in Bingham v. State, 523 S.W.2d 948, 949 (Tex. Cr. App. 1975), when the second judge, who assessed greater punishment, did not try the case the first time but was aware of the punishment assessed by the first judge and did not affirmatively support the sentence with the required data. Finally, in Ex parte Bowman, 523 S.W.2d 677 (Tex. Cr. App. 1975), the judge assessed greater punishment on retrial but filed findings of fact in which he attempted to justify the longer sentence. The essence of his findings was that additional evidence at the second trail about the violent nature of the crime and the defendant's prior record justified a longer sentence. In remanding the case of reassessment of punishment consistent with *Pearce*, the court commented, "None of the factors which the trial judge listed as the basis for his increased punishment occurred after the time of the original sentencing." 523 S.W.2d at 679.

The effect of the foregoing authorities on the sentence in this case is obvious. There is no evidence in the record before us of "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." The trial judge made extensive findings in support of her action but, as in *Bowman*, those properly supported by the evidence relate to the original crime, not to defendant's subsequent conduct. Thus, the increased

sentence was imposed in violation of *North Carolina v. Pearce.*[2] Ground of error three is sustained.

Appellant does not request a remand, asking instead that we reform the judgment to reflect a sentence of 20 years. Because that is the maximum sentence that can be imposed consistent with *Pearce*, the request is granted, the judgment is reformed to assess punishment of twenty years in the Texas Department of Corrections and the sentence is reformed to provide that appellant shall be confined in the Texas Department of Corrections for an indeterminate term of not less that 5 nor more than 20 years.[3] As reformed, the judgment is affirmed.

Richard N. Countiss
Associate Justice

Publish.

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[2] This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant.

[3] Because we are reforming a sentence entered prior to repeal of the indeterminate sentence law, compare art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon 1979), with art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), we have imposed the indeterminate sentence that should have been imposed by the trial court.

Appendix "B"

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AMARILLO
PANEL C
MARCH 18, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

ON MOTION FOR REHEARING

In a well-reasoned brief in support of its motion for rehearing, the State suggests we erred in applying the principles of North Carolina v. Pearce, 395 U.S. 711 (1969), to the facts of this case. While we are satisfied that our conclusions were correct, and observe that most of the State's arguments were answered either directly or inferentially in our original opinion, two matters require additional discussion.

The State argues that this case materially differs from *Pearce* because this appellant was granted a new trial by

the trial judge, not by an appellate court. Although that is a difference, it is not a distinction. The purpose of *Pearce* is to forbid vindictiveness against a defendant who successfully pursues post-conviction remedies. As quoted from *Pearce* in our original opinion, due process "requires that vindictiveness against a defendant *for having successfully attacked his first conviction* must play no part in the sentence he received after a new trial." 395 U.S. at 725 (Emphasis added.) It is immaterial whether the new trial is obtained by an order from the trial court or by a judgment of an appellate court; the principles stated in *Pearce* still must be observed on retrial.

The State also contends, alternatively, that the trial judge complied with *Pearce* because her findings pinpoint identifiable conduct of the defendant occurring after the first sentencing proceeding. Specifically, says the State, she found an absence of remorse and indications of a life style by appellant that justified a greater sentence. Assuming *arguendo* that those findings articulate the kind of identifiable conduct contemplated by *Pearce*, we are unable to discern any evidence, i.e., "objective information," in the record affirmatively establishing the occurrence of those matters within the requisite time frame. As previously discussed, *Pearce* requires (1) objective information (2) of identifiable conduct (3) by the defendant (4) occurring after the time of the original sentencing proceeding. 395 U.S. at 725. Element (4), at least, was not proven.

We have carefully considered all matters raised by the State in its motion for rehearing, but are satisfied we have correctly applied precedents we are required to follow. The motion for rehearing is overruled.

Richard N. Countiss
Associate Justice

Appendix "C"

SANFORD JAMES McCULLOUGH, Appellant

NO. 351-83 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Seventh Supreme Judicial District of Texas (Potter County)

OPINION ON DISCRETIONARY REVIEW ON THE COURT'S OWN MOTION

Appellant was convicted of murder in September 1980 and assessed punishment at 20 years confinement by the jury. Subsequently appellant's motion for new trial was granted and upon re-trial, appellant was again found guilty by a jury. Appellant elected to have the court assess punishment at the second trial, and the trial judge, who had presided at the first trial, assessed punishment at 50 years confinement. On appeal, the Amarillo Court of Appeals found that the increased punishment assessed by the court violated the principles of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969).[1] The Court did not remand the case but instead granted appellant's requested reformation of the punishment to 20 years. See McCullough v. State, ___ S.W.2d ___. We granted review on our own motion under Art. 44.45(a), V.A.C.C.P. to determine the authority of the Court of Appeals to reform the punishment.

Art. 44.24(b), V.A.C.C.P., provides:

> "(b) The courts of appeals and the Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment or may enter any other appropriate

order as the law and nature of the case may require."

In Bogany v. State, ___S.W.2d ___ (Del. November 17, 1983), we held that the authority of a court on appeal to reform a judgment under Art. 44.24, supra, does not extend to the situation where the error involves punishment unauthorized by law. A judgment or sentence may only be reformed "to cause those instruments to reflect the true finding of the fact finder when such a finding is reflected in the verdict or, in a bench trial, the pronouncement of the court's finding." Milczanowski v. State, 645 S.W.2nd 445, 447 (Tex. Cr. App. 1983).

In the instant case the judgment of the trial court assessing 50 years confinement was found by the Court of Appeals to be unauthorized under North Carolina v. Pearce, supra. As such, the Court of Appeals was unable to reform the punishment and should have remanded the cause to the trial court for the proper assessment of punishment.[2]

Accordingly, the judgment of the Court of Appeals is reversed. The cause is remanded for assessment of punishment by the trial court in accordance with North Carolina v. Pearce, supra.

TOM G. DAVIS, Judge

(Delivered December 7, 1983)

EN BANC

[1] Appellant's other grounds of error were overruled by the Court of Appeals.

[2] Such procedure has been followed in opinions of this Court which have involved unlawful punishments under North Carolina v. Pearce, supra. See e.g., Lechuga v. State, 532 S.W.2d 581 (Tex. Cr. App. 1976); Ex parte Bowman, 523 S.W.2d 377 (Tex. Cr. App. 1975); Payton v. State, 506 S.W.2d 912 (Tex. Cr. App. 1974).

Appendix "D"

SANFORD JAMES McCULLOUGH, Appellant
NO. 351-83 vs.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, 7th Sup. Jud. Dist. RANDALL County

OPINION ON STATE'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW

The question presented on state's motion for rehearing is whether the presumption of vindictiveness established by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), when a greater sentence is imposed following retrial, is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.

In *Pearce*, a defendant who obtained a reversal of his conviction on appeal received a longer sentence from a judge on retrial than that originally imposed by the judge in the first trial. The United States Supreme Court stated that it would be a violation of the Due Process Clause of the Fourteenth Amendment for a trial court to impose a heavier sentence upon a reconvicted defendant "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 89 S.Ct. at 2080. The Court noted, however, that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Id., n. 20. Thus the Court found it necessary to establish a prophylactic rule to protect defendants from actual vindictiveness as well as from the reasonable apprehension of vindictiveness that could deter a defendant from appealing a conviction:

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

"In order to assure the absence of such a motivation, we have concluded that *whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon ojective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id., 89 S.Ct. 2080, 2081.

Simply stated, the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct[1] on the part of the defendant occurring after the time of the original sentencing proceeding.

In the instant case appellant was convicted of murder in September 1980, and assessed punishment at 20 years' confinement by a jury. Appellant subsequently moved for a new trial alleging that the trial judge erred in not granting appellant's motions for mistrial asserted for improper jury argument and the prosecutor's cross-examination of a witness regarding a co-defendant's confession. The trial court granted the motion for new trial, and appellant was retried for the same offense, *before the same judge who presided at the first trial.* At the second trial the jury again found appellant guilty of murder. Unlike the first trial, however, appellant did not request jury sentencing, and therefore, the trial court was required to assess punishment under Art. 37.07, Sec. 2(b), V.A.C.C.P., which provides in pertinent part:

> "[I]f a finding of guilty is returned, it shall then be the responsibility of the judge to assess punishment applicable to the offense; provided, however, that . . . in . . . cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury."

The trial court assessed punishment at 50 years, overruling appellant's contention that the 30 year increase in

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[1] The Supreme Court recently held that under *Pearce*, a sentence may be increased on retrial based on an intervening *event*, as well as on intervening *conduct*. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). In *Wasman*, the Supreme Court upheld an increased sentence on retrial, where the intervening "event" relied on for the increased sentence was a conviction for a different offense, rendered after the first trial, but for conduct committed before the first trial, where the trial court stated that such conduct was not considered at the first sentencing proceeding.

sentence contravened the holding in North Carolina v. Pearce, supra. After assessing punishment and sentencing appellant, the trial court entered an order in response to appellant's motion for findings of fact. In the order the trial court stated that it found *Pearce* inapplicable to the instant case "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial." The court also set out findings of fact attempting to justify the increased sentence for the record in the event that *Pearce* was found to be applicable on appeal.

The Court of Appeals found *Pearce* to be applicable, and also found that the trial court's findings of fact did not satisfy *Pearce*. Accordingly, the Court of Appeals held that the increased sentence was illegal, and reformed the sentence from 50 years to 20. We initially reviewed the Court of Appeals' opinion on our own motion solely to determine the authority of the Court of Appeals to reform the punishment. We held that the Court of Appeals was without authority to reform a sentence "unauthorized by law" and remanded the cause to the trial court for resentencing in accordance with *Pearce*, supra.

The state does not contend on rehearing that the trial court's findings of fact in support of the increased sentence satisfy *Pearce*. Cf. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Rather, the state asserts that *Pearce* is inapplicable when a jury first assesses punishment and a judge subsequently assesses punishment upon retrial.

It is clear that the rule of *Pearce* is not applicable when upon retrial, a *jury* renders a higher sentence than originally imposed at the first trial. Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 412 U.S. 17 (1973); see also Casias v. State, 452 S.W.2d 483; Gibson v. State, 448 S.W.2d 481. However, in holding *Pearce* inapplicable to jury resentencing, the Supreme Court in *Chaffin* noted three important distinctions: The Court stated that "[t]he first prerequisite

for the imposition of a retaliatory penalty is knowledge of the prior sentence." *Chaffin*, supra, 93 S.Ct. at 1982. In *Chaffin*, it was conceded that the jury was not informed of the prior sentence, and thus this first prerequisite was not present. The Court specifically noted, however, that "[t]he State agreed at oral argument that it would be improper to inform the jury of the prior sentence and that *Pearce* might be applied in a case which, either because of the highly publicized nature of the prior trial or because of some other irregularity, the jury was so informed." Id., at 1983, n. 14.

The second distinguishing factor noted by the Supreme Court in jury resentencing is that "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction." Id. at 1983. Finally, the Court noted that "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals."

Applying these factors to the case at bar, we find that the three important considerations of *Pearce* found inapplicable to jury resentencing in *Chaffin* are all present here: first, the trial judge obviously knew the sentence pronounced by the jury at the first trial, since she presided over the first trial. Second, the second sentence was in fact "meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required" a new trial. Finally, since the trial judge assessed punishment on retrial, the third element cited in *Chaffin* above is also present.

The state concedes that we have held *Pearce* to be applicable to precisely the same facts in Miller v. State, 472 S.W.2d 269. The state urges that *Miller* was wrongly decided. In light of the explicit language of *Chaffin*, supra, however, we cannot agree.

The fact that under Art. 37.07, Sec. 2(b), supra, appellant had a right to have the jury assess punishment on retrial, and chose not to do so, does not affect our determination; nor is it important that appellant chose to have the jury assess punishment at the first trial. As long as the Legislature allows defendants to elect between jury or judge punishments, defendants should be allowed to make that choice without fear of vindictiveness.

The state next suggests that through its decisions in Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), (*Pearce* held inapplicable where defendant conceded no vindictiveness present); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (*Pearce* held inapplicable in two-tier system involving trial de novo); and Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), (*Pearce* held not retroactive); the Supreme Court has retreated from the holding in *Pearce* and that *Pearce* is perhaps no longer viable. This contention is without merit. See Wasman v. United States, supra note 1, 104 S.Ct. 3217 (1984).[2]

The state's final contention is that *Pearce* is inapplicable "to a situation where a different sentencing authority assesses the punishment on retrial." Thus the state challenges the validity of our decision in Bingham v. State, 523 S.W.2d 948, where we held *Pearce* to be applicable when a judge assessed punishment at the first trial, and a different judge assessed a greater punishment upon remand. The state apparently overlooks the fact that in *Pearce* itself, a different judge assessed the punishment upon retrial. See

[2] Indeed in *Wasman*, in response to dicta in Chief Justice Burger's plurality opinion that *Pearce* only prohibits increased sentences based on *actual vindictiveness*, five Justices concurred, stating in substance that the *Pearce* presumption is not simply concerned with actual vindictiveness, but is also intended to protect against the reasonable apprehension of vindictiveness that could deter a defendant from seeking a new trial.

State v. Pearce, 145 S.E.2d 918; State v. Pearce, 151 S.E.2d 571; see also Chaffin v. Stynchcombe, supra, 93 S.Ct. at 1990, n. 4 (dissenting opinion).

In light of the foregoing, we conclude that the prophylactic rule set out in North Carolina v. Pearce, supra, is applicable to the instant case, and thus the state's contention on rehearing is overruled.

The state also asserts that we wrongly held on original submission that the Court of Appeals was without authority to reform appellant's sentence. We are convinced that this issue was properly decided on original submission and overrule this contention.

The state's motion for rehearing is overruled.

ODOM, Judge

(Delivered December 5, 1984)

En Banc

Appendix "E"

Article 37.07
Texas Code of Criminal Procedure

Art. 37.07. [693] [770] [750] *Verdict must be general; separate hearing on proper punishment*

Section 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) *Except as provided in Article* **37.071,** *if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense;*

provided, however, that (1) in any criminal action where the jury may recommend probation and defendant filed his sworn motion for probation before the trial began, and (2) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) *In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail*

to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(d) *When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.*

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1839, ch. 659, § 22, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 968, ch. 399, § 2(A), eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1126, ch. 426, art. 3, § 2, eff. June 14, 1973.

Appendix "F"

NO. 3442-C

The State Of Texas	I	In The 251st District Court
vs.	I	In And For
Sanford James McCullough	I	Randall County, Texas

ORDER IN RESPONSE TO THE DEFENDANT'S MOTION FOR FINDINGS OF FACT

In response to the Defendant's *Motion for Findings of Fact*, this Court finds that the rule prohibiting the assessment of a heavier sentence upon retrial under those circumstances set forth in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S. Ct. 2072 (and the cases following the precedent outlined in *Pearce*) does not apply to this case because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial. However, in the event that the Honorable Texas Court of Criminal Appeals holds that the *Pearce* doctrine is applicable to the facts of this case, then this Court makes the following findings of fact and conclusions of law solely for the appellate record:

1. Upon retrial, and after the time of the original sentencing proceeding, newly developed evidence, to-wit: the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown (witnesses who did not testify at the first trial), served to establish the following:

(a) The testimony of these two new witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense.

(b) It also served to corroborate the testimony of Charles McCullough and Dr. Jose Diaz-Esquivel (both of whom testified at the first trial and again upon retrial) and gave added weight to the testimony of these witnesses.

(c) This new testimony had a direct bearing upon the credibility of three witnesses who testified at the first trial, namely: Charles McCullough, Dennis McCullough, and the defendant himself. The testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown added to the credibility of the State's key witness, Charles McCullough, and detracted from the credibility of Dennis McCullough and the defendant who both testified for the defense.

(d) The testimony of Willie Lee Brown reinforced and lent credence to the testimony of Carolyn Sue Hollison McCullough, and vice versa.

(e) The testimony of these new witnesses shed new light upon the defendant's life, conduct, and his mental and moral propensities.

(f) This testimony had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial.

(g) Finally, their testimony provided the court with insight as to this particular defendant's propensity to commit brutal crimes against persons and to constitute a future threat to society.

2. Upon retrial the defendant made it known to the court through his own testimony that he had been released from the penitentiary only 4 months before the murder in question occurred.

3. Upon retrial this court also considered the fact that if the defendant had elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury.

4. Upon retrial and after the original sentencing proceeding, two more witnesses (Carolyn Sue Hollison McCullough and Willie Lee Brown) had indicated by their testimony that although the defendant admitted cutting the throat of the victim, he never showed any remorse to them for his acts.

5. The defendant himself upon retrial of a murder case in which the victim was repeatedly stabbed and beaten in a malicious and brutal manner never exhibited any signs of remorse whatsoever at any stage of the proceedings.

6. Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the defendant failed to show this court any sign or intention of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society.

Signed and Entered this the 24th day of February, 1981.

Naomi Harney

Judge of the 251st District Court
in and for
Randall County, Texas

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 84-1198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

vs.

SANFORD JAMES McCULLOUGH,

Respondent

RESPONSE TO STATE'S PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

LAW OFFICES OF MANN & LANEY
600 Ash Street
Plainview, Texas 79073
(806) 293-2618

ATTORNEYS FOR RESPONDENT

STATEMENT OF INDIGENCY

Respondent would show, as is evidenced by his affidavit collaterally filed, that he is presently incarcerated within the Texas Department of Corrections at Huntsville, Texas, where he has remained since his second trial which was held in December of 1980. Respondent has no funds with which to hire counsel, counsel having been appointed to represent Respondent at both of the trials which resulted in the conviction forming the basis of the State's Petition for Writ of Certiorari and, counsel having been appointed to represent Respondent through the appellate process of the Courts of the State of Texas.

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1198

THE STATE OF TEXAS

Petitioner,

vs.

SANFORD JAMES McCULLOUGH,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent was convicted of the first degree felony offense of murder in September, 1980. That trial was to a jury who decided not only the guilt of Respondent, but also assessed punishment at 20 years' confinement. At his first trial, Respondent had filed, as is his prerogative under Texas law, a

written request asking that the jury assess punishment in the event of a conviction. Such procedure is allowed pursuant to Article 37.07, Texas Code of Criminal Procedure. Subsequent to this conviction and sentence, Respondent filed a Motion for New Trial asking that the conviction and sentence be set aside. The prosecutor agreed with Respondent that a new trial should be granted. (The Court of Appeals for the Seventh Supreme Judicial District of Texas, upon a reading of the entire record, noted as was in fact the case, that the State was apparently unhappy because only 20 years was assessed. See Appendix "A", page 4 of Petitioner's Petition for Writ of Certiorari.) The trial court, as was later reflected by Finding No. 3 in the document entitled "Order in Response to the Defendant's Motion for Findings of Fact", acknowledged that the punishment was insufficient in the opinion of the trial court.

Subsequent to the second trial which was held in December, 1980, the trial judge assessed the 50 year sentence presently in question. Respondent successfully sought a reformation and reduction of the sentence to a like punishment as was meted out upon the first conviction. This case has been reviewed by the intermediate Court of Appeals for the Seventh Supreme Judicial District of Texas sitting at Amarillo, Texas, as well as the Court of Criminal Appeals at Austin, Texas, the highest

court within the jurisdictional framework of the State of Texas to which a criminal case may be appealed.

RESPONSE TO REASONS FOR GRANTING WRIT

I.

THE CONCEPT OF GUARDING AGAINST THE POSSIBILITY OF JUDICIAL VINDICTIVENESS UNDER THE HOLDING OF THIS HONORABLE COURT IN NORTH CAROLINA V. PEARCE, 395 U.S. 711, WAS NOT REBUTTED BY THE RATIONALE OF THIS COURT IN WASMAN V. UNITED STATES, 468 U.S. ____, AND THE TEXAS COURT OF CRIMINAL APPEALS APPLIED APPROPRIATE DISTINCTIONS BETWEEN PEARCE AND WASMAN SO AS TO ARRIVE AT THE RIGHT RESULT IN DISPOSING OF RESPONDENT'S APPEAL BELOW.

In Respondent's initial appeal from his second conviction and harsher sentence, he took the position before the intermediate Court of Appeals for the State of Texas that North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), controlled the issue of whether the trial court had the authority to impose a harsher sentence. The Court of Appeals agreed with Respondent's position, pointing out that the State was apparently unhappy with the 20 year sentence handed down by the jury in the first trial, and the Court gave literal interpretation to Pearce so as to assure an absence of vindictiveness on the part of the judiciary because of Respondent's exercise of initiating his

appellate rights by filing a Motion for New Trial. The Amarillo Court of Appeals pointed out that this case was not the first time this question had been presented to an appellate Texas court by noting that in the case of The State of Texas v. Miller, 472 S.W.2d 269 (Tex. Cr. App. 1971) the highest appellate court for criminal matters in Texas had held, in a situation where a jury had imposed the first punishment and the judge a harsher second punishment, that the trial court was without authority to impose a harsher punishment unless the required justification explained in Pearce was present.

Discussing whether or not the trial judge's purported findings upon which she based the harsher sentence satisfied the requirements of Pearce, the Amarillo, Texas intermediate Court of Appeals noted that there was no "objective information" in the record which affirmatively established sufficient reason for a harsher judicially imposed sentence than was meted out by the jury in the first trial. Accordingly, the Amarillo, Texas Court of Appeals overruled the State's Motion for Rehearing.

The State then filed a Petition for Discretionary Review to the Court of Criminal Appeals for Texas, the highest court having appellate authority in criminal matters. The initial consideration by the Court of Criminal Appeals dealt with the limited question of whether the intermediate appellate court had had the right to reform the sentence or merely remand the case to

the trial court for appropriate action consistent with the opinion of the appellate court. The Court of Criminal Appeals, therefore, tacitly approved the action of the Court of Appeals in Amarillo by refusing to write on the sufficiency of the record so as to allow an increased punishment by the judge at the second trial or the applicability of Pearce in general. The State, not satisfied, filed a Motion for Rehearing with the Court of Criminal Appeals, limiting its question to whether the doctrine of Pearce applies in a limited circumstance where a jury assesses a first punishment and the same trial judge assesses punishment in a second trial.

The Court of Criminal Appeals at Austin, Texas, relying upon the due process clause of the Fourteenth Amendment to the United States Constitution, and relying upon Pearce, noted as did this Honorable Court earlier, that ". . .the existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Thus, the very heart of the issue was exposed clearly by the Court of Criminal Appeals of Texas, pointing out that the doctrine and logic of Pearce was realistic and fair and necessary.

Noting that the State did not attempt to present the question of whether or not the findings of the trial judge justified the harsher subsequent sentence, the Court of Criminal Appeals reminded us that Article 37.07, Section 2(b), Texas Code of Criminal Procedure affords a defendant the right to have a jury

assess punishment on retrial. Carrying out the spirit of Pearce, the Court of Criminal Appeals pointed out that the right of a defendant in Texas to select a judge as opposed to a jury, or vice versa, for the imposition of punishment, was a right which was granted by the legislature and correctly noted that as long as such a right was created by statute, any defendant should be allowed to make the choice guaranteed by that statutory right without fear of vindictiveness.

The Court of Criminal Appeals of Texas did not decide the manner of applicability of Pearce within the confines of the jurisdiction of Texas and the enforcement of the Penal Code and the Code of Criminal Procedure of the State of Texas without considering the case primarily relied upon by the State in this Petition for Writ of Certiorari, Wasman v. United States, 468 U.S. ____, 82 L.Ed.2d 424, 104 S.Ct. 3217 (1984). The Court of Criminal Appeals of Texas pointed out that dicta in Chief Justice Burger's plurality opinion of Wasman indicated that it is only actual vindictiveness which is to be guarded against. The Court of Criminal Appeals further pointed out that the concurring justices, in their opinions in Wasman, seemed to rest their decisions upon the sound and realistic logic of Pearce to the effect that not only is actual vindictiveness to be guarded against, but also a fear of vindictiveness.

To guard against actual vindictiveness is no more important than to guard against the fear or apprehension of

vindictiveness for if either is present, a defendant is going to be impeded in the exercise of appellate rights. Whether the guarantee of those rights comes from the Constitution of the United States, Federal statute, state constitutions or some state statute such as Article 37.07, Texas Code of Criminal Procedure, makes no difference. If a sovereign affords a right, then the citizenry should have freedom and ease in claiming and exercising such a right. To limit the Pearce rationale to situations of actual vindictiveness would be to impose restraints upon the free will of a citizen who, in fact, could probably not overcome, by an actual showing of vindictiveness, the protection and sanctity afforded the judiciary.

There was another distinction between the case at bar and Wasman inasmuch as the defendant in Wasman went before the sentencing judge after the second trial with an intervening conviction on his record. Such was not the situation in the case at bar.

II.

APPLICATION BY THE TEXAS COURTS OF THE PEARCE RULE IN CIRCUMSTANCES WHERE A JURY HAS ASSESSED PUNISHMENT AT THE FIRST TRIAL AND A JUDGE IS CALLED UPON TO ASSESS PUNISHMENT IN A SUBSEQUENT TRIAL DOES NOT DENY THE TRIAL JUDGE DISCRETION WITH REGARD TO SENTENCING.

It is conceded that in the absence of an intervening conviction, as was the case of Wasman, or in the absence of other objective, identifiable conduct on the part of the accused as required in Pearce, the trial judge is going to be limited to a punishment that was imposed by the fact finder of the first trial. A balancing test must be applied, however. The law must strike a balance between the interests of judiciary in imposing "individual" standards of one particular judge and the vice sought to be avoided by Pearce, i.e. a free and unfettered exercise of all, not just some, rights afforded an accused citizen. As pointed out earlier, if a state statute such as Article 37.07, Texas Code of Criminal Procedure affords an accused an additional right or greater rights than does some other jurisdiction, then that state's statutory right afforded the accused must be enforced in favor of that accused. Due process of law and fundamental fairness require and would allow no less.

If the State's concern with judicial hand-tying is of sufficient concern to warrant a change from the established practice within the State of Texas, then the legislature of the State is the appropriate body to make such a change. The issue in question is really one of "state's rights" and an issue which could best be determined by the workings of government within the confines of the borders of this State. There is no claim made that the present system denies any citizen of due process of law. In fact, it is the position of the Respondent that the present statutory scheme in Texas and the law of this state, as evidenced by the intermediate Court of Appeals and the Court of Criminal Appeals in Texas has assured the Respondent of due process of law and fundamental fairness. Moreover, if this Honorable Court were to intervene and establish a rule which is sought by the State, and were such rule to be applied retroactively, the Respondent would be very muchly denied due process of law and fundamental fairness as well as being denied equal protection under the law.

North Carolina v. Pearce, was unquestionably the law at the time Respondent exercised his initial appellate rights by filing a Motion for New Trial. To now deny the Respondent the benefit of the Doctrine of Stare Decisis and the privileges and freedoms under Pearce would be an unfair changing of the rules.

III.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FORMS SUFFICIENT FOUNDATION FOR A REBUTABLE PRESUMPTION OF JUDICIAL VINDICTIVENESS IN ALL CASES OF RETRIAL AND SUBSEQUENT PUNISHMENT ASSESSMENTS, WHETHER BY JUDGE OR JURY.

So as to actually and realistically afford due process to a citizen facing sentencing after a second conviction for the same offense, the law should balance between the judiciary's right to impose punishment on the one hand and the rights of the citizen to avail himself of all rights surrounding his experience within the criminal justice system.

It is again respectfully pointed out that the opinion in Wasman was a plurality opinion not interpreted by this writer to limit the Pearce rationale to situations of actual vindictiveness. Actual vindictiveness, fear of vindictiveness -- it makes no difference; the end result is still the same. To limit the Pearce rationale to situations where actual vindictiveness could be proven is to, in a purportedly respectable way, overrule Pearce in its entirety [illegible] require the unrealistic.

CONCLUSION AND PRAYER

Respondent believes that the legal precedents and arguments applicable to the issues in this case were considered by and decided appropriately by the appellate courts of the State of Texas as those courts applied their own statutes. The decisions, therefore, of the Texas appellate courts must be allowed to stand and procedural changes, if they are needed, made by the jurisdiction involved, the State of Texas, through legislative process.

In the event this Honorable Court decides to apply the rationale of North Carolina v. Pearce in a manner differently from the two appellate courts of the State of Texas, then such application should be made prospectively only so as not to be fundamentally unfair to the Respondent who relied upon the state of the law as it existed at the time that he exercised his appellate rights which led to a sentence two and one-half times more severe than his first sentence.

Respectfully submitted,

LAW OFFICES OF MANN & LANEY
600 Ash Street
Plainview, Texas 79073
(806) 293-2618

By _____
Mark Laney
SBN 11892500

ATTORNEYS FOR THE RESPONDENT

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Response to State's Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas has this the 10 day of April, 1985, been furnished to the Mr. Deane C. Watson, Assistant Criminal District Attorney, Associate, Appellate Section, Randall County Courthouse, Canyon, Texas 79015.

_____
Mark Laney

NO. 84-1198

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TEXAS,

Petitioner,

v.

SANFORD JAMES McCULLOUGH,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 23, 1985
CERTIORARI GRANTED JUNE 10, 1985

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RELEVANT DOCKET ENTRIES

First Trial

CRIMINAL DOCKET

Number of Case	STYLE OF CASE	ATTORNEYS
3237-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod State John Mann (App.) Defendant

Date of Orders	ORDERS OF COURT
4 21 80	Def. appeared & filed affidivit of inability to employ Counsel. Appointed John Mann, Set for trial June 9, 1980 & pre-trials on May 23, 1980. Bond set at $50,000 ret. instanter. Defendant's Waiver of Arraignment & Order Accepting.
5 29 80	Defendant's Motion for Appointment of an Investigator & Order Appointing Jim Patterson.
7 01 80	Defendant's 1st motion for Continuance.
7 14 80	Order for Continuance to 8-11-80.
7 18 80	Def. appeared with his attorney for hearing on pre-trial Motions State appeared through ass't C.D.A. Wes Clayton. All parties announced ready on pre-trial Motions. Confession held admissible.
8 01 80	Def. attorney & D. A. appeared hearing on pre-trials Motions.
8 11 80	States 1st Motion for Continuance & Order granting.

Number of Case	STYLE OF CASE	ATTORNEYS
3237-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod State John Mann (App.) Defendant

Date of Orders	ORDERS OF COURT
9 22 80	Def. appeared with his attorney & state appeared through its attorney Randy Sherrod Criminal Dist. Attorney & Wes Clayton. All parties announced ready. Jury instructed & Voir Dired by Counsel. Challenges made. Jury sworn and instructed, Indictment read, pled not guilty. Evidence received. Both sides rested & closed. Jury recessed 9:30 a. m. September 23, 1980.
9 23 80	Objections to the Charge overruled.
9 23 80	Arguments of attorneys. 10:23 a. m. Jury retired to deliberate, 3:55 p.m. Jury returned with verdict of guilty. Charge to jury on punishment. Arguments of Counsel. Jury retired to deliberate, Jury returned a verdict of 20 years, Def. took 10 days to file Motions — to return Oct. 6, 1980.
10 03 80	Motion for New Trial
10 06 80	Motion for New trial joined by D. A. granted, Def. present represented by John Mann, State present.
11 03 80	Def.'s application for Change of Venue.
11 04 80	State's Controverting Affidavit.

Number of Case	STYLE OF CASE	ATTORNEYS
3237-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod State John Mann (App.) Defendant

Date of Orders	ORDERS OF COURT
11 08 80	Def. & Atty Mann Asst. D. A. Clayton. All parties announced ready for hearing. Change Venue denied. Case re-set Dec. 8, 1980 at 9:00 a. m., pre-trial Motions ruled on.
6 12 81	Order of Dismissal signed & entered Reindicted 3442-C

Indictment

First Trial

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS:

The Grand Jurors for the County of Randall, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the January Term, A.D. 1980, of the 251st District Court of said County, upon their oaths present in and to said Court, that SANFORD JAMES McCULLOUGH, on or about the 5th day of April, A.D. 1980, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly cause the death of George Preston Small by stabbing him with a knife, AGAINST THE PEACE AND DIGNITY OF THE STATE.

Richard Ware II
Foreman of the Grand Jury.

First Trial

NO. 3237-C

The State Of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, SANFORD JAMES McCULLOUGH, stands charged by indictment with the offense of murder, alleged to have been committed in Randall County, Texas, on or about the 5th day of April, 1980.

To this charge the defendant has pleaded not guilty.

You are instructed that the law applicable to this case is as follows:

1.

Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

2.

"Person" means an individual. "Individual" means a human being who has been born and is alive.

"Another" means a person other than the accused.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objectives or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts

knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

3.

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

Each party to an offense may be charged with the commission of the offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

Mere presence alone will not make a person a party to an offense.

4.

Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that on or about the 5th day of April, 1980, as alleged in the indictment, the defendant, SANFORD JAMES McCULLOUGH, either acting alone or with another as a party to the offense, as that term has been hereinbefore defined in Paragraph 3, did then and there intentionally or knowingly cause the death of George Preston Small by stabbing him with a knife, then you will find the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder.

Unless you so find and believe beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant, SANFORD JAMES McCULLOUGH, not guilty of the offense of murder.

5.

The only function of the jury under this charge is to determine the guilt, if any, of the defendant or the innocence of the defendant according to the directions

and instructions contained herein, the matter of punishment, should you find the defendant guilty, being the subject of further proceedings in the trial.

6.

You are instructed that a grand jury indictment is not evidence of guilt. It is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence, nor can it be considered by you in passing upon the innocence or guilt of this defendant.

7.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

8.

In all criminal cases, the burden of proof is on the State and never shifts to the defendant. The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to defendant's guilt after considering all the evidence before you and these instructions, you will acquit the defendant and say by your verdict "Not Guilty."

9.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the Court which is here given to you in these written instructions, and you must be governed thereby.

10.

During your deliberations in this case, you must not consider, discuss or relate any matters not in evidence

before you. You should not consider or mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

11.

After you have retired to the jury room, you should select one of your members as your foreman. It is his duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by signing the same as foreman.

12.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys or the Court, or anyone else concerning any question you may have.

13.

After you have arrived at your verdict, you may use one of the verdict forms attached hereto by having your foreman sign his name to the particular form that conforms to your verdict, but in no event shall he sign more than one of such forms.

Naomi Harney
Judge Presiding

Additional Instructions Following Jury's Questions During Deliberations

MEMBERS OF THE JURY:

In view of your request for reading of certain portions of the testimony, I instruct you that the rule is as follows:

> "If the jury disagree as to the statement of any witness, they may, upon applying to the Court, have read to them from the court reporter's notes that part of the witness' testimony on the point in dispute."

In accordance with the rule, you are instructed that a request to have the court reporter's notes read cannot be complied with unless the jury disagree as to the statement of the witness. Therefore, it will be necessary for you to certify that you are in dispute as to the statement of a witness, and you should request that part of the witness' statement on the point in dispute, and only on that point which is in dispute.

Naomi Harney
Judge Presiding

#3237-C
THE STATE OF TEXAS
VS. SANFORD JAMES McCULLOUGH

VERDICT

We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, not guilty.

(not signed)
Foreman of the Jury

* * * * *

We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder, as alleged in the indictment.

Deborah Welch
Foreman of the Jury

NO. 3237

The State Of Texas — In the 251st District

vs. — Court

Sanford McCullough — Randall County, Texas

Comes now the defendant and elects that punishment in this cause, if any, be assessed by the jury.

Sanford McCullough, Jr.
Defendant

NO. 3237-C

The State Of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

CHARGE OF THE COURT

MEMBERS OF THE JURY:

By your verdict returned in this case, you have found the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder, as charged in the indictment, which was alleged to have been committed in Randall County, Texas, on or about the 5th day of April, 1980.

It now becomes your duty to assess the punishment within the limits prescribed by law.

1.

You are instructed that the punishment for the offense of murder is by confinement in the Texas Department of Corrections for life or for any term not more than 99 years or less than five years, and in addition you may assess a fine not to exceed $10,000.00.

Therefore, you will assess the punishment upon said finding of guilt at life or at any term of not more than 99 years or less than five years, and in addition, you may assess a fine not to exceed $10,000.00.

2.

You are instructed that you cannot, and you must not, render any quotient verdict; that is, in arriving at any penalty or term of punishment, you are not to arrive at the same by setting down the term, amount or degree of punishment favored by each juror, adding the same and

dividing by twelve, the number of jurors; nor are you to arrive at such penalty in any other manner than by discussion of the evidence bearing thereon.

3.

In determining the punishment in this case, you are instructed that you are not to discuss among yourselves how long the defendant will be required to serve any sentence you decide to impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor of the State of Texas and are no concern of yours.

4.

You, the jury, are the exclusive judges of the credibility of the witnesses, of the weight to be given the evidence and of the facts proved, but you are bound to receive the law from this Court as given in this charge and be governed thereby.

5.

After you have retired to the jury room, it is the duty of your foreman to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by signing his name as foreman to one of the verdict forms attached hereto, but in no event shall he sign more than one of such forms.

6.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys or the Court, or anyone else concerning any question you may have.

Naomi Harney
Judge Presiding

#3237-C - THE STATE OF TEXAS
VS. SANFORD JAMES McCULLOUGH

VERDICT FORMS

We, the jury, having found the defendant guilty as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for 20 years.

Deborah Welch
Foreman of the Jury

* * * * *

We, the jury, having found the defendant guilty as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for _____ and, in addition to such confinement, assess a fine of $_____.

(not signed)
Foreman of the Jury

NO. 3237-C

The State of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

JUDGMENT

On the 22nd day of September, 1980, the above entitled and numbered cause was regularly reached and called for trial, and came the State of Texas by and through her Criminal District Attorney, Randall L. Sherrod and her Assistant Criminal District Attorney, Wesley G. Clayton, and the defendant, SANFORD JAMES McCULLOUGH, appeared in person and in open court, his counsel, John Mann, also being present, and the said defendant, SANFORD JAMES McCULLOUGH, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial; and thereupon a jury, to-wit: Deborah Welch and eleven others, was duly selected, impaneled and sworn, who, having heard to the evidence submitted, the Court's charge, and the argument of counsel, retired in charge of the proper officer to consider its verdict, and afterward was brought into open court by the proper officer, and the defendant and his counsel also being present, and returned into open court the following verdict, which was received by the Court, and is now entered upon the Minutes of this Court, to-wit:

> "We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, Guilty of the Offense of Murder, as charged in the indictment.
>
> *Deborah Welch*
> Foreman of the Jury"

Thereupon the jury, having heard additional evidence on the punishment and the argument of counsel for the State and for the defendant, assessed punishment of the defendant at confinement in the Texas Department of Corrections for a term of twenty (20) years.

THE COURT FURTHER FINDS that the defendant used a deadly weapon as defined in §1.07 (a) 11, Texas Penal Code, during the commission of a felony offense.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the defendant, SANFORD JAMES McCULLOUGH, is guilty of the offense of Murder, as charged in the indictment, and as found by the jury, said offense having been committed on the 5th day of April, 1980, and that he be punished by confinement in the Texas Department of Corrections for a term of twenty (20) years; and that the State of Texas do have and recover of said defendant all costs in this proceeding incurred, for which let execution issue, and that the said defendant be remanded to jail to await the further orders of this Court.

Naomi Harney
Judge Presiding

NO. 3237-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes SANFORD JAMES McCULLOUGH, Defendant in the above styled and numbered cause, by and through his court-appointed attorney of record, JOHN MANN, and makes and files this his Motion for New Trial and would respectfully show unto the Court as follows:

I.

The Trial Court erred in not granting Defendant's Motion for Mistrial subsequent to the prosecutor's improper jury argument concerning the fact that the jury, if they only gave the Defendant ten or fifteen years in the penitentiary, would look outside their window at the end of that period of time and wonder if the criminal out there was the Dedendant.

II.

The Trial Court erred in overruling Defendant's Motion for Mistrial subsequent to the prosecutor's cross-examination of the witness, DENNIS McCULLOUGH, as to a purported "confession" given by a Co-Defendant, KENNETH McCULLOUGH. Such conduct constituted error in light of *Bruton vs. United States.*

WHEREFORE, PREMISES CONSIDERED, Defendant

prays that this Motion for New Trial be set for hearing and that upon such hearing, said Motion be in all things granted.

Respectfully submitted,

MANN & McCONNELL
Attorneys at Law
310 West Sixth Street
Amarillo, Texas 79101
(806) 372-5711

By *John Mann*

ATTORNEY FOR DEFENDANT

ORDER SETTING HEARING

The Court, after considering Defendant's Motion for New Trial, is of the opinion that such Motion should be set for hearing:

IT IS THEREFORE ORDERED that Defendant's Motion for New Trial, be, and it is, set for hearing on the _____ day of _____, 1980, at _____ o'clock _____. M.

SIGNED this _____ day of October, 1980, in chambers.

_____
Judge Presiding

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Defendant's Motion for New Trial and Order Setting Hearing has this the 3rd day of October, 1980, been furnished to Mr. Randall Sherrod, Criminal District Attorney, Randall County Courthouse, Canyon, Texas, by hand delivery.

John Mann

NO. 3237-C

The State Of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

ORDER GRANTING NEW TRIAL

This the 6th day of October, 1980, came on to be heard the Motion of the defendant, SANFORD JAMES McCULLOUGH, for new trial in the above entitled and numbered cause; and said motion having been presented to the court in due time, manner and form, with due notice, and with the District Attorney agreeing with said motion,

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the same be and is hereby granted.

Naomi Harney
Judge Presiding

RELEVANT DOCKET ENTRIES

Second Trial

CRIMINAL DOCKET

Number of Case	STYLE OF CASE	ATTORNEYS
3442-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs. Sanford James McCullough	Randall Sherrod, State John Mann, Defendant

Date of Orders	ORDERS OF COURT
12 09 80	Order transferring to the 251st District Court
12 11 80	Def. appeared with his attorney John Mann. Def. waived 10 days to prepare for trial & two days for arraignment. Def. arraigned. Def. request that the record in 3237-C be transferred and made a part of the record in this case. Def. attorney John Mann, Dist. Attorney Sherrod all announced ready for trial. Jury instructed and Voir Dired by attorneys Challenges made. Jury sworn & instructed. Indictment read. Def. plea not guilty. Evidence heard. State rested. Jury recessed until 9:00 a. m. 12-12-80.
12 12 80	Def. rested State & Def. closed. Jury charged Arguments by Counsel. 11:04 a. m. Jury retired to deliberate 3:55 p. m. Jury returned a verdict of guilty. Punishment set by the Court at 50 years in T. D. C.
12 29 80	Hearing on Motion for New trial. Motion overruled. Def. Sentenced.

Number of Case	STYLE OF CASE	ATTORNEYS
3442-C	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod, State John Mann, Defendant

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Date of Orders	ORDERS OF COURT
12 29 80	State appeared by her Assistant Criminal District Attorney, Dean Watson, and the Defendant appeared in person and with counsel, John Mann. Defendant announced ready to accept sentence. Defendant was sentenced to confinement in the Texas Department of Corrections for not more than fifty years nor less than five years and was remanded to the custody of the Randall County Sheriff until said Sheriff can obey the directions of said sentence. Defendant was advised of his right to appeal and that he was entitled to have an attorney appointed by the Court to represent him on appeal if he could not afford an attorney, and the Defendant in open court gave notice of appeal to the Court of Criminal Appeals and requested that the Court appoint an attorney.
12 29 80	Judgement and sentence signed and entered.
01 06 81	Notice of Appeal and Motion for Findings of Fact.
01 08 81	Order overruling Defendant's Motion for New Trial signed and entered.
02 24 81	Order in response to the Def.'s Motion for Findings of Fact.

Number of Case	STYLE OF CASE	ATTORNEYS
3442-C	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod, State John Mann, Defendant

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Date of Orders	ORDERS OF COURT
4 23 81	Order Approving Record without Hearing
6 12 81	Order extending time for filing Appellant's brief
8 18 81	Order extending time for filing Appellee's brief

Indictment

Second Trial

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS:

The Grand Jurors for the County of Randall, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the July Term, A.D. 1980, of the 181st District Court of said County, upon their oaths present in and to said Court, that SANFORD JAMES McCULLOUGH, on or about the 5th day of April, A.D. 1980, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly cause the death of an individual, George Preston Small, by stabbing him with a knife, AGAINST THE PEACE AND DIGNITY OF THE STATE.

James Pat Scarborough
Foreman of the Grand Jury.

Second Trial

NO. 3442-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

ELECTION ON PUNISHMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SANFORD JAMES McCULLOUGH, Defendant in the above-styled and numbered cause, and files this his election in writing with regard to the assessment of punishment, if any, in this cause and in support thereof would respectfully show the Court as follows:

I.

The election to have punishment assessed by the jury was filed by the Defendant in the above-styled and numbered cause prior to the beginning of a prior trial in this cause, which trial ended in a new trial being granted.

II.

The above-styled and numbered cause is being tried this, a second time, as the result of the Court setting aside the verdict of the jury and a judgment of conviction heretofore rendered against the Defendant in the above-styled and numbered cause.

Therefore, the case having been returned to a posture of no conviction having been entered against the Defendant, the Defendant, hereby elects that at the trial of the above-styled and numbered cause scheduled to begin on December 10, 1980, the punishment, if any, assessed against the

Defendant in the case of a conviction be assessed by the Court.

Respectfully submitted,

Sanford James McCullough
Defendant

NO. 3442-C

The State Of Texas	)	In The 251st Judicial
vs.	)	District Court In And For
Sanford James McCullough	)	Randall County, Texas

JUDGMENT

On the 11th day of December, 1980, the above entitled and numbered cause was regularly reached and called for trial, and came the State of Texas by her Criminal District Attorney, Randall L. Sherrod, and her Assistant Criminal District Attorney, Wesley G. Clayton, and the defendant, SANFORD JAMES McCULLOUGH, appeared in person in open court, his counsel, John Mann, also being present, and the said defendant, SANFORD JAMES McCULLOUGH, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial; and thereupon a jury, to-wit: Lewis J. Tversky and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, the Court's charge, and the argument of counsel, retired in charge of the proper officer to consider its verdict, and afterward was brought into court by the proper officer, the defendant and his counsel being present, and returned into open court the following verdict, which was received by the Court and is now entered upon the Minutes of this Court, to-wit:

> "We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder as alleged in the indictment.
>
> */s/ Lewis J. Tversky*
> Foreman of the Jury."

Thereupon the Court, having heard additional evidence on the issue of punishment and the argument of counsel for the State and for the defendant, assessed the punishment of the defendant at confinement in the Texas Department of Corrections for a term of fifty (50) years.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the defendant, SANFORD JAMES McCULLOUGH, is guilty of the offense of Murder, as charged in the indictment and as found by the jury, said offense having been committed on the 5th day of April, 1980, and that he be punished by confinement in the Texas Department of Corrections for a term of fifty (50) years; and that the State of Texas do have and recover of said defendant all costs in this proceeding incurred, for which let execution issue, and that the said defendant be remanded to jail to await the further orders of the Court herein.

THE COURT FURTHER FINDS that the defendant exhibited a deadly weapon as defined in §1.07(a)11, Texas Penal Code, during the commission of this felony offense.

THE COURT FURTHER FINDS that the deadly weapon used or exhibited by the defendant was a knife.

Naomi Harney
Judge Presiding

NO. 3442-C

The State Of Texas	X	In The 251st District
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

SENTENCE

On this the 29th day of December, 1980, this cause being again called, the State appeared by her Assistant Criminal District Attorney, and the defendant, SANFORD JAMES McCULLOUGH, accompanied by his attorney, John Mann, was brought into open court, in person, and in charge of the Sheriff, for the purpose of having a sentence of law pronounced in accordance with the Judgment to be rendered and entered against him on the 11th day of December 1980.

And thereupon the defendant, SANFORD JAMES McCULLOUGH, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and the defendant having waived the ten days allowed for sentencing and agreed to accept sentence this date, whereupon the Court proceeded, in the presence of the said defendant, SANFORD JAMES McCULLOUGH, and his attorney, John Mann, to pronounce sentence, as follows:

IT IS THE ORDER OF THIS COURT that the defendant, SANFORD JAMES McCULLOUGH, who has been adjudged, guilty of the offense of murder, said offense having been committed on the 5th day of April, 1980, and whose punishment has been assessed at fifty (50) years confinement in the Texas Department of Corrections, be delivered by the Sheriff of Randall County, Texas, immediately to the Department of Corrections of

the State of Texas, or other person authorized to receive such convicts, and the said SANFORD JAMES McCULLOUGH shall be confined in said penitentiary for not less than five (5) years nor more than fifty (50) years, in accordance with the provisions of the law governing the penitentiaries of said State:

_____

_____

_____

and the said SANFORD JAMES McCULLOUGH is remanded to jail until said Sheriff can obey the directions of this sentence. And the defendant was informed of his right to appeal and that he was entitled to have counsel appointed by the Court to perfect an appeal if he could not afford to employ counsel for said appeal; and the defendant stated that he did wish to appeal his case and did not wish to have counsel appointed.

Naomi Harney
Judge Presiding

NO. 3442-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

MOTION FOR FINDINGS OF FACT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now SANFORD McCULLOUGH, Defendant in the above styled and numbered cause, and respectfully moves the Court to enter, in writing, findings of fact pertinent in the above cause as follows:

I.

1. SANFORD McCULLOUGH respectfully moves the Court to state in the record, in writing, what identifiable data showing what objective conduct on the part of the Defendant, occurring subsequent to the original sentencing proceeding in Cause No. 3237-C, was used by the Court in assessing Defendant's punishment at fifty years' confinement in the Texas Department of Corrections in the above styled and numbered cause, the Defendant having been sentenced to only twenty years' confinement in the Texas Department of Corrections by a jury in Cause No. 3237-C.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the Trial Court timely make such findings of fact as requested herein.

Respectfully submitted,

Sanford McCullough
Defendant

A true and correct copy of the above and foregoing has this the 6th day of January, 1981, been furnished to Mr. Randall Sherrod, Criminal District Attorney, Randall County Courthouse, Canyon, Texas, by hand delivery.

John Mann

NO. 3442-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

ORDER IN RESPONSE TO THE DEFENDANT'S MOTION FOR FINDINGS OF FACT

In response to the Defendant's *Motion for Findings of Fact*, this Court finds that the rule prohibiting the assessment of a heavier sentence upon retrial under those circumstances set forth in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct., 2072 (and the cases following the precedent outlined in *Pearce*) does not apply to this case because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial. However, in the event that the Honorable Texas Court of Criminal Appeals holds that the *Pearce* doctrine is applicable to the facts of this case, then this Court makes the following findings of fact and conclusions of law solely for the appellate record:

1. Upon retrial, and after the time of the original sentencing proceeding, newly developed evidence, to-wit: the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown (witnesses who did not testify at the first trial), served to establish the following:

(a) The testimony of these two new witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense.
(b) It also served to corroborate the testimony of Charles McCullough and Dr. Jose Diaz-Esquivel (both of whom testified at the first trial and again upon retrial) and gave added weight to the testimony of

these witnesses.

(c) This new testimony had a direct bearing upon the credibility of three witnesses who testified at the first trial, namely: Charles McCullough, Dennis McCullough, and the defendant himself. The testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown added to the credibility of the State's key witness, Charles McCullough, and detracted from the credibility of Dennis McCullough and the defendant who both testified for the defense.

(d) The testimony of Willie Lee Brown reinforced and lent credence to the testimony of Carolyn Sue Hollison McCullough, and vice versa.

(e) The testimony of these new witnesses shed new light upon the defendant's life, conduct, and his mental and moral propensities.

(f) This testimony had a direct effect upon the strength of the State's case against the defendant, and served to greatly enhance the State's case at both the guilt and punishment phases of the trial.

(g) Finally, their testimony provided the court with new insight as to this particular defendant's propensity to commit brutal crimes against persons and to constitute a future threat to society.

2. Upon retrial the defendant made it known to the court through his own testimony that he had been released from the penitentiary only four months before the murder in question occurred.

3. Upon retrial this court also considered the fact that if the defendant had elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury.

4. Upon retrial and after the original sentencing proceeding, two more witnesses (Carolyn Sue Hollison McCullough and Willie Lee Brown) had indicated by their testimony that although the defendant admitted cutting the throat of the victim, he never showed any remorse to them for his acts.

5. The defendant himself upon retrial of a murder case in which the victim was repeatedly stabbed and beaten in a malicious and brutal manner never exhibited any signs of remorse whatsoever at any stage of the proceedings.

6. Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the failed to show this court any sign or intention of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society.

Signed and Entered this the 24th day of February, 1981.

Naomi Harney
Judge of the 251st District Court
in and for
Randall County, Texas

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AMARILLO
PANEL C
FEBRUARY 3, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

Appellant was convicted of murder, § 19.02, Tex. Penal Code Ann. (Vernon 1974), and sentenced to 50 years in the penitentiary. He contends the trial court erred when it (1) refused to grant his motion for change of venue, (2) admitted bloody photographs of his victim, and (3) imposed a greater sentence on retrial than was imposed by the jury when appellant was first tried for the crime. We reform and affirm.

In September, 1980, appellant was convicted of murder and assessed 20 years in the penitentiary by a jury. Subsequently, appellant's motion for new trial was granted and he was tried again in December, 1980. At the second trial, the question of guilt was again tried before a jury, but appellant permitted the trial judge to assess punishment. The judge, who had also presided at the first trial, assessed 50 years in the penitentiary.

In the interim between the first and second trial, appellant moved for a change of venue under art. 31.03, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), with supporting affidavits, alleging that there was so great a prejudice against him in the county that he could not obtain a fair trial. The State controverted the motion and the trial court heard evidence from various witnesses. The State presented evidence that appellant could receive a fair trial in the county and appellant presented evidence that he could not. Appellant also introduced evidence of news media coverage of the crime and his first trial and conviction. The trial court's denial of his motion is the basis for his first ground of error.

Where, as here, the propriety of a change of venue is contested, the trial court's resolution of the dispute on its merits after a hearing will be reversed only if the court abused its discretion. McManus v. State, 591 S.W.2d 505, 516 (Tex. Cr. App. 1980). When conflicting evidence on the issue is presented, the court seldom abuses its discretion by denying the motion, Chappell v. State, 519 S.W.2d 453, 457 (Tex. Cr. App. 1975), even if the case has been publicized by the news media. Morris v. State, 488 S.W.2d 768, 771 (Tex. Cr. App. 1973).

In this case, we find no error in the denial of the motion. Credible conflicting evidence was presented and the trial court resolved the conflict against appellant. By doing so, it did not abuse its discretion. Ground of error one is overruled.

By his second ground, appellant contends the trial court erred in admitting seven photographs. The color photographs depict the victim's cuts and wounds and the murder scene, the victim's bedroom, in vivid and gruesome detail.

Appellant advances two arguments against the admissibility of the photographs. First, he says, they were not material because the defense stipulated that the victim was stabbed to death. Second, assuming some of the photographs were admissible, appellant argues that others were cumulative, and introduced only to inflame and prejudice the jury.

In Martin v. State, 475 S.W.2d 265, 267 (Tex. Cr. App. 1972), the general rule for admission of photographs in a criminal case is stated:

> We hold that if a photograph is competent, material and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to arouse the passions of the jury, unless it is offered solely to inflame the minds of the jury. If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible.
> (Footnotes omitted.)

Accord: Terry v. State, 491 S.W.2d 161, 163 (Tex. Cr. App. 1973).

The trial court did not abuse its discretion by admitting the photographs. First, the appellant cannot, by stipulating the cause of death, deprive the State of the duty and function of presenting all relevant evidence to the jury, "nor avoid facing the full facts of the crime." Harrison v. State, 501 S.W.2d 668, 669 (Tex. Cr. App. 1973).

Likewise, we do not agree that some of the photographs were merely cumulative and used solely to inflame and prejudice the jury. The photographs are extremely unpleasant to observe, but that does not make them inadmissible. Martin v. State, *supra*. The first four depict the victim or the scene from different angles and perspectives and aid the fact finder in understanding what occurred at the scene. The last three show the victim after the blood had been cleaned off the body, and aid the fact finder in understanding the medical testimony. Thus, each photograph is material, competent and relevant, depicts matters verbally describable, and clarified or aids in the understanding of other evidence. Ground of error two is overruled.

By his third ground, appellant attacks the punishment assessed on retrial. After the jury assessed twenty years imprisonment in his first trial, appellant moved for a new trial and the State, apparently unhappy because only twenty years was assessed, agreed with the appellant that a new trial should be granted. The trial court then granted the motion. Upon retrial, appellant permitted the trial judge to assess punishment and she assessed 50 years imprisonment. In this court, appellant says the increased punishment violates the constitutional principles stated in North Carolina v. Pearce, 395 U.S. 711 (1969). We agree.

In *Pearce*, the Supreme Court found no constitutional impediment *per se* to the imposition of greater punishment on retrial of a defendant. It was concerned, however, with the possibility that greater punishment on retrial would be assessed solely to penalize a defendant who had successfully sought a new trial. To prevent that occurrence, the Court established a new rule for state courts, in the following language:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant *be freed* of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

395 U.S. at 725. (Last emphasis added.)

Later, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Supreme Court limited *Pearce* to cases where the judge determines punishment, by holding that a jury can impose greater punishment upon retrial "so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness." 412 U.S. at 35.[1]

[1] Although *Pearce* places the burden on the trial judge to prove that greater punishment on retrial was based on post-first-trial acts by the defendant, and was not the result of vindictiveness, (and conclusively presumes vindictiveness unless the sentence is properly justified), 395 U.S. at 725, *Chaffin* places the burden on the defendant to prove that the retrial jury was vindictive. 412 U.S. at 35.

As it must, our Court of Criminal Appeals has followed *Pearce* and Chaffin. In State v. Miller, 472 S.W.2d 269 (Tex. Cr. App. 1971), it held that a judge imposed penalty of 99 years, given on retrial after the jury in the first case had assessed 40 years, was illegal when not supported by the affirmative justification required by *Pearce*. It applied the same rule and found unassigned error in Bingham v. State, 523 S.W.2d 948, 949 (Tex. Cr. App. 1975), when the second judge, who assessed greater punishment, did not try the case the first time but was aware of the punishment assessed by the first judge and did not affirmatively support the sentence with the required data. Finally, in Ex parte Bowman, 523 S.W.2d 677 (Tex. Cr. App. 1975), the judge assessed greater punishment on retrial but filed findings of fact in which he attempted to justify the longer sentence. The essence of his findings was that additional evidence at the second trail about the violent nature of the crime and the defendant's prior record justified a longer sentence. In remanding the case of reassessment of punishment consistent with *Pearce*, the court commented, "None of the factors which the trial judge listed as the basis for his increased punishment occurred after the time of the original sentencing." 523 S.W.2d at 679.

The effect of the foregoing authorities on the sentence in this case is obvious. There is no evidence in the record before us of "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." The trial judge made extensive findings in support of her action but, as in *Bowman*, those properly supported by the evidence relate to the original crime, not to defendant's subsequent conduct. Thus, the increased

sentence was imposed in violation of *North Carolina v. Pearce.*[2] Ground of error three is sustained.

Appellant does not request a remand, asking instead that we reform the judgment to reflect a sentence of 20 years. Because that is the maximum sentence that can be imposed consistent with *Pearce,* the request is granted, the judgment is reformed to assess punishment of twenty years in the Texas Department of Corrections and the sentence is reformed to provide that appellant shall be confined in the Texas Department of Corrections for an indeterminate term of not less that 5 nor more than 20 years.[3] As reformed, the judgment is affirmed.

Richard N. Countiss
Associate Justice

Publish.

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[2] This case demonstrates the excessive scope of *Pearce.* The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant.

[3] Because we are reforming a sentence entered prior to repeal of the indeterminate sentence law, compare art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon 1979), with art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), we have imposed the indeterminate sentence that should have been imposed by the trial court.

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO
PANEL C
MARCH 18, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

ON MOTION FOR REHEARING

In a well-reasoned brief in support of its motion for rehearing, the State suggests we erred in applying the principles of North Carolina v. Pearce, 395 U.S. 711 (1969), to the facts of this case. While we are satisfied that our conclusions were correct, and observe that most of the State's arguments were answered either directly or inferentially in our original opinion, two matters require additional discussion.

The State argues that this case materially differs from *Pearce* because this appellant was granted a new trial by

the trial judge, not by an appellate court. Although that is a difference, it is not a distinction. The purpose of *Pearce* is to forbid vindictiveness against a defendant who successfully pursues post-conviction remedies. As quoted from *Pearce* in our original opinion, due process "requires that vindictiveness against a defendant *for having successfully attacked his first conviction* must play no part in the sentence he received after a new trial." 395 U.S. at 725 (Emphasis added.) It is immaterial whether the new trial is obtained by an order from the trial court or by a judgment of an appellate court; the principles stated in *Pearce* still must be observed on retrial.

The State also contends, alternatively, that the trial judge complied with *Pearce* because her findings pinpoint identifiable conduct of the defendant occurring after the first sentencing proceeding. Specifically, says the State, she found an absence of remorse and indications of a life style by appellant that justified a greater sentence. Assuming *arguendo* that those findings articulate the kind of identifiable conduct contemplated by *Pearce*, we are unable to discern any evidence, i.e., "objective information," in the record affirmatively establishing the occurrence of those matters within the requisite time frame. As previously discussed, *Pearce* requires (1) objective information (2) of identifiable conduct (3) by the defendant (4) occurring after the time of the original sentencing proceeding. 395 U.S. at 725. Element (4), at least, was not proven.

We have carefully considered all matters raised by the State in its motion for rehearing, but are satisfied we have correctly applied precedents we are required to follow. The motion for rehearing is overruled.

Richard N. Countiss
Associate Justice

SANFORD JAMES McCULLOUGH, Appellant

NO. 351-83 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Seventh Supreme Judicial District of Texas (Potter County)

OPINION ON DISCRETIONARY REVIEW ON THE COURT'S OWN MOTION

Appellant was convicted of murder in September 1980 and assessed punishment at 20 years confinement by the jury. Subsequently appellant's motion for new trial was granted and upon re-trial, appellant was again found guilty by a jury. Appellant elected to have the court assess punishment at the second trial, and the trial judge, who had presided at the first trial, assessed punishment at 50 years confinement. On appeal, the Amarillo Court of Appeals found that the increased punishment assessed by the court violated the principles of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969).[1] The Court did not remand the case but instead granted appellant's requested reformation of the punishment to 20 years. See McCullough v. State, ___ S.W.2d ___. We granted review on our own motion under Art. 44.45(a), V.A.C.C.P. to determine the authority of the Court of Appeals to reform the punishment.

Art. 44.24(b), V.A.C.C.P., provides:

> "(b) The courts of appeals and the Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment or may enter any other appropriate

order as the law and nature of the case may require."

In Bogany v. State, ___ S.W.2d ___ (Del. November 17, 1983), we held that the authority of a court on appeal to reform a judgment under Art. 44.24, supra, does not extend to the situation where the error involves punishment unauthorized by law. A judgment or sentence may only be reformed "to cause those instruments to reflect the true finding of the fact finder when such a finding is reflected in the verdict or, in a bench trial, the pronouncement of the court's finding." Milczanowski v. State, 645 S.W.2nd 445, 447 (Tex. Cr. App. 1983).

In the instant case the judgment of the trial court assessing 50 years confinement was found by the Court of Appeals to be unauthorized under North Carolina v. Pearce, supra. As such, the Court of Appeals was unable to reform the punishment and should have remanded the cause to the trial court for the proper assessment of punishment.[2]

Accordingly, the judgment of the Court of Appeals is reversed. The cause is remanded for assessment of punishment by the trial court in accordance with North Carolina v. Pearce, supra.

TOM G. DAVIS, Judge

(Delivered December 7, 1983)

EN BANC

[1] Appellant's other grounds of error were overruled by the Court of Appeals.

[2] Such procedure has been followed in opinions of this Court which have involved unlawful punishments under North Carolina v. Pearce, supra. See e.g., Lechuga v. State, 532 S.W.2d 581 (Tex. Cr. App. 1976); Ex parte Bowman, 523 S.W.2d 677 (Tex. Cr. App. 1975); Payton v. State, 506 S.W.2d 912 (Tex. Cr. App. 1974).

SANFORD JAMES McCULLOUGH, Appellant
NO. 351-83 vs.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, 7th Sup. Jud. Dist. RANDALL County

OPINION ON STATE'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW

The question presented on state's motion for rehearing is whether the presumption of vindictiveness established by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), when a greater sentence is imposed following retrial, is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.

In *Pearce,* a defendant who obtained a reversal of his conviction on appeal received a longer sentence from a judge on retrial than that originally imposed by the judge in the first trial. The United States Supreme Court stated that it would be a violation of the Due Process Clause of the Fourteenth Amendment for a trial court to impose a heavier sentence upon a reconvicted defendant "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 89 S.Ct. at 2080. The Court noted, however, that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Id., n. 20. Thus the Court found it necessary to establish a prophylactic rule to protect defendants from actual vindictiveness as well as from the reasonable apprehension of vindictiveness that could deter a defendant from appealing a conviction:

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

"In order to assure the absence of such a motivation, we have concluded that *whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id., 89 S.Ct. 2080, 2081.

Simply stated, the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct[1] on the part of the defendant occurring after the time of the original sentencing proceeding.

In the instant case appellant was convicted of murder in September 1980, and assessed punishment at 20 years' confinement by a jury. Appellant subsequently moved for a new trial alleging that the trial judge erred in not granting appellant's motions for mistrial asserted for improper jury argument and the prosecutor's cross-examination of a witness regarding a co-defendant's confession. The trial court granted the motion for new trial, and appellant was retried for the same offense, *before the same judge who presided at the first trial.* At the second trial the jury again found appellant guilty of murder. Unlike the first trial, however, appellant did not request jury sentencing, and therefore, the trial court was required to assess punishment under Art. 37.07, Sec. 2(b), V.A.C.C.P., which provides in pertinent part:

> "[I]f a finding of guilty is returned, it shall then be the responsibility of the judge to assess punishment applicable to the offense; provided, however, that . . . in . . . cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury."

The trial court assessed punishment at 50 years, overruling appellant's contention that the 30 year increase in

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[1] The Supreme Court recently held that under *Pearce*, a sentence may be increased on retrial based on an intervening *event*, as well as on intervening *conduct*. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). In *Wasman*, the Supreme Court upheld an increased sentence on retrial, where the intervening "event" relied on for the increased sentence was a conviction for a different offense, rendered after the first trial, but for conduct committed before the first trial, where the trial court stated that such conduct was not considered at the first sentencing proceeding.

sentence contravened the holding in North Carolina v. Pearce, supra. After assessing punishment and sentencing appellant, the trial court entered an order in response to appellant's motion for findings of fact. In the order the trial court stated that it found *Pearce* inapplicable to the instant case "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial." The court also set out findings of fact attempting to justify the increased sentence for the record in the event that *Pearce* was found to be applicable on appeal.

The Court of Appeals found *Pearce* to be applicable, and also found that the trial court's findings of fact did not satisfy *Pearce*. Accordingly, the Court of Appeals held that the increased sentence was illegal, and reformed the sentence from 50 years to 20. We initially reviewed the Court of Appeals' opinion on our own motion solely to determine the authority of the Court of Appeals to reform the punishment. We held that the Court of Appeals was without authority to reform a sentence "unauthorized by law" and remanded the cause to the trial court for resentencing in accordance with *Pearce,* supra.

The state does not contend on rehearing that the trial court's findings of fact in support of the increased sentence satisfy *Pearce*. Cf. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Rather, the state asserts that *Pearce* is inapplicable when a jury first assesses punishment and a judge subsequently assesses punishment upon retrial.

It is clear that the rule of *Pearce* is not applicable when upon retrial, a *jury* renders a higher sentence than originally imposed at the first trial. Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 412 U.S. 17 (1973); see also Casias v. State, 452 S.W.2d 483; Gibson v. State, 448 S.W.2d 481. However, in holding *Pearce* inapplicable to jury resentencing, the Supreme Court in *Chaffin* noted three important distinctions: The Court stated that "[t]he first prerequisite

for the imposition of a retaliatory penalty is knowledge of the prior sentence." *Chaffin,* supra, 93 S.Ct. at 1982. In *Chaffin*, it was conceded that the jury was not informed of the prior sentence, and thus this first prerequisite was not present. The Court specifically noted, however, that "[t]he State agreed at oral argument that it would be improper to inform the jury of the prior sentence and that *Pearce* might be applied in a case which, either because of the highly publicized nature of the prior trial or because of some other irregularity, the jury was so informed." Id., at 1983, n. 14.

The second distinguishing factor noted by the Supreme Court in jury resentencing is that "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction." Id. at 1983. Finally, the Court noted that "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals."

Applying these factors to the case at bar, we find that the three important considerations of *Pearce* found inapplicable to jury resentencing in *Chaffin* are all present here: first, the trial judge obviously knew the sentence pronounced by the jury at the first trial, since she presided over the first trial. Second, the second sentence was in fact "meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required" a new trial. Finally, since the trial judge assessed punishment on retrial, the third element cited in *Chaffin* above is also present.

The state concedes that we have held *Pearce* to be applicable to precisely the same facts in Miller v. State, 472 S.W.2d 269. The state urges that *Miller* was wrongly decided. In light of the explicit language of *Chaffin,* supra, however, we cannot agree.

The fact that under Art. 37.07, Sec. 2(b), supra, appellant had a right to have the jury assess punishment on retrial, and chose not to do so, does not affect our determination; nor is it important that appellant chose to have the jury assess punishment at the first trial. As long as the Legislature allows defendants to elect between jury or judge punishments, defendants should be allowed to make that choice without fear of vindictiveness.

The state next suggests that through its decisions in Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), (*Pearce* held inapplicable where defendant conceded no vindictiveness present); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (*Pearce* held inapplicable in two-tier system involving trial de novo); and Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), (*Pearce* held not retroactive); the Supreme Court has retreated from the holding in *Pearce* and that *Pearce* is perhaps no longer viable. This contention is without merit. See Wasman v. United States, supra note 1, 104 S.Ct. 3217 (1984).[2]

The state's final contention is that *Pearce* is inapplicable "to a situation where a different sentencing authority assesses the punishment on retrial." Thus the state challenges the validity of our decision in Bingham v. State, 523 S.W.2d 948, where we held *Pearce* to be applicable when a judge assessed punishment at the first trial, and a different judge assessed a greater punishment upon remand. The state apparently overlooks the fact that in *Pearce* itself, a different judge assessed the punishment upon retrial. See

[2] Indeed in *Wasman*, in response to dicta in Chief Justice Burger's plurality opinion that *Pearce* only prohibits increased sentences based on *actual vindictiveness*, five Justices concurred, stating in substance that the *Pearce* presumption is not simply concerned with actual vindictiveness, but is also intended to protect against the reasonable apprehension of vindictiveness that could deter a defendant from seeking a new trial.

State v. Pearce, 145 S.E.2d 918; State v. Pearce, 151 S.E.2d 571; see also Chaffin v. Stynchcombe, supra, 93 S.Ct. at 1990, n. 4 (dissenting opinion).

In light of the foregoing, we conclude that the prophylactic rule set out in North Carolina v. Pearce, supra, is applicable to the instant case, and thus the state's contention on rehearing is overruled.

The state also asserts that we wrongly held on original submission that the Court of Appeals was without authority to reform appellant's sentence. We are convinced that this issue was properly decided on original submission and overrule this contention.

The state's motion for rehearing is overruled.

ODOM, Judge

(Delivered December 5, 1984)

En Banc

Article 37.07
Texas Code of Criminal Procedure

Art. 37.07. [693] [770] [750] *Verdict must be general; separate hearing on proper punishment*

Section 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) *Except as provided in Article* **37.071,** *if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense;*

provided, however, that (1) in any criminal action where the jury may recommend probation and defendant filed his sworn motion for probation before the trial began, and (2) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) *In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail*

to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(d) *When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.*

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1839, ch. 659, § 22, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 968, ch. 399, § 2(A), eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1126, ch. 426, art. 3, § 2, eff. June 14, 1973.

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
NUMBER 0351-83

Sanford James McCullough

vs.

THE STATE OF TEXAS

On this 20th day of February, 1985, came on to be considered the motion of the State Prosecuting Attorney for leave to file and State's Second Motion for Rehearing.
AND SUCH MOTION IS HEREBY DENIED.

IT IS SO ORDERED.

PER CURIAM

Motion to Stay Mandate Granted. Mandate stayed for 30 days.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

BY: *Sherrie Ericson*
DEPUTY CLERK

(2)

NO. 84-1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

v.

SANFORD JAMES McCULLOUGH,

Respondent

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

BRIEF FOR PETITIONER

RANDALL L. SHERROD,
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Randall County, Texas

* DEANE C. WATSON,
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34 pp

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment require application of the presumption of judicial vindictiveness stated in *North Carolina* v. *Pearce*, 395 U.S. 711, or is such a presumption rebutted, in a jurisdiction where the defendant has the right to elect to have either the jury or the judge assess punishment, under the following facts:

(1) Defendant elected to have the jury assess his punishment at his first trial.;

(2) Defendant filed a Motion for New Trial which was granted by the presiding judge;

(3) Defendant elected at his second trial to have the same presiding judge determine his punishment;

(4) The same presiding judge assessed greater punishment than the jury assessed at the first trial;

(5) The same presiding judge filed Findings of Fact and Conclusions of Law stating reasons based on evidence first heard at the defendant's second trial, for assessing the greater punishment?

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TABLE OF AUTHORITIES

OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, dated February 3, 1983, with the additional opinion of that Court denying rehearing, dated March 18, 1983, are both reported as *McCullough* v. *State of Texas,* 680 S.W.2d 493, (Tex. App. — Amarillo — 1983). These opinions are also printed in the Joint Appendix (J.A. 36, for that Court's original opinion; and J.A. 43 for its opinion denying rehearing)

The opinion of the Texas Court of Criminal Appeals in this same cause, but numbered 351-83 in that Court, on Discretionary Review on its own motion, delivered December 7, 1983, is printed in the Joint Appendix (J.A. 45). It is not yet reported.

The Opinion of the Texas Court of Criminal Appeals in this cause, under its same cause number 351-83, on State's Motion for Rehearing on Petition for Discretionary Review, dated December 5, 1984, is printed in the Joint Appendix (J.A. 47). It is not yet reported.

The Order of the Texas Court of Criminal Appeals denying leave to file State's second motion for rehearing and staying execution of mandate, dated February 20, 1985. It is not reported. It is printed in the Joint Appendix (J.A. 57).

JURISDICTION

Within the time allowed by applicable Texas Rules and Statutes, the State of Texas presented this matter to the Texas Court of Criminal Appeals, requesting Discretionary Review. The Court of Criminal Appeals granted Discretionary Review of the decision and holdings of the Court of Appeals for the Seventh Supreme Judicial District at Amarillo. Subsequently on December 7, 1983, the Texas Court of Criminal Appeals rendered its Opinion on Discretionary Review. In that opinion the Texas Court of Criminal Appeals sustained the Amarillo 7th Court of Appeals by answering adversely the question presented in this Brief. On a different question not germane to the one presented herein, the Texas Court of Criminal Appeals reversed the Amarillo Court of Appeals on the matter of reformation of punishment (J.A. 46). Shortly thereafter, the Court of Criminal Appeals granted the State's First Motion for Rehearing and, on December 5, 1984, that Court delivered its final opinion on the same question herein, adversely to the State contentions and position. A timely filed Motion by the State of Texas for leave to file State's Second Motion for Rehearing, accompanied by the State's Second Motion for Rehearing, was denied on February 20, 1985 by the Texas Court of Criminal Appeals (J.A. 57). The Petition for a Writ of Certiorari granted hereby this honorable Court was docketed in this Court on January 23, 1985 and was granted on June 10, 1985. Petitioner has raised the issue indicated in the foregoing Question Presented at every stage of these proceedings.

This Court's Jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 37.07, Code of Criminal Procedure of Texas:

This Article 37.07 expresses the Statutory Requirements regarding the assessment of the punishment upon a defendant who is convicted in any criminal case other than a misdemeanor case of which the justice court or the municipal court has jurisdiction. Essentially, this statute provides for a bifurcated trial, with the finding of guilt or innocence being the first duty of the jury, with Section 2(b) thereof providing that in the event of a finding of guilty then it is the responsibility of the judge to assess the punishment applicable to the offense; However, that statute in Section 2(b)2 permits the defendant, at the time he enters his plea in open court, to choose as the determiner of his punishment that same jury which determined guilt or innocence. If the defendant makes no election then the trial

judge is required to determine and assess punishment if the jury makes a finding of guilty.

Article 37.07 is printed in the Joint Appendix (J.A. 54).

STATEMENT OF THE CASE

On Saturday morning, April 5, 1980, George Preston Small's body was found in his Amarillo home by a friend. [S.F., Cause No. 3442-C, Vol. 1, P. 7] Mr. Small lived alone in a quiet residential area. The friend who discovered the body notified police who came and examined the scene.

Mr. Small's bed was covered with his blood. His body was face up on the floor near the bed. There were multiple stab wounds in his chest and his throat had been slit through and through in two parallel places.

The murder weapon was established to be a large, ten inch, hook bladed butcher knife found nearby. Decedent had also been bludgeoned numerous times on the head and face. [S.F., Cause No. 3442-C, Vol. 1, P. 23-62] According to the pathologist the cause of death was massive hemothorax secondary to stab wounds in the chest. [S.F., Cause No. 3442-C, Vol. 1, P. 75]

The friend who found the body had been in Mr. Small's home as late as 8:45 the night before, and had been invited there for breakfast the next morning, Saturday, when he found Mr. Small dead.

A few days later, Homicide officers for the City of Amarillo apprehended three suspects who subsequently were all indicted for this murder. Sanford James McCullough, Respondent, was the first of them to be tried.

In September, 1980, in a two part trial consisting of the guilt or innocence phase and the punishment phase, the jury found the Respondent guilty of the murder of George

Preston Small.[1] In that first trial, Respondent had made the written election (J.A. 11) required by Article 37.07 Texas Code of Criminal Procedure (J.A. 54). In his written election he chose the jury to assess his punishment following their guilty verdict (J.A. 11). Therefore, the court conducted the second phase of the trial in which the jury received evidence and determined the punishment. In the punishment hearing the jury set Respondent's punishment at 20 years confinement (J.A. 14).

Within the statutory time, the Respondent filed his Motion for New Trial to the same court and judge who conducted his first trial (J.A. 17). He alleged in that Motion that the trial judge had erred in denying his motions for mistrial during the trial proceedings. He also complained of impropriety in the prosecution's jury arguments and in its cross-examination of one of Respondent's defense witnesses.

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[1] The other two suspects, also later convicted of the George Small Murder, were relatives of the Respondent. They were Dennis McCullough, Respondent's brother, who pleaded guilty on January 5, 1981, and by plea bargain before the same Judge who conducted Respondent's trials, was sentenced to 50 years confinement. The other, Kenneth Wayne McCullough, respondent's cousin, pleaded not guilty. Following a finding of guilty by the jury on February 5, 1981, he elected to be sentenced by the same judge who conducted Respondent's trial and the Dennis McCullough trial. That Judge sentenced Kenneth McCullough to 50 years confinement.

The same trial judge granted Respondent's Motion for New Trial.

The second trial began on December 11, 1980, before the same judge. On December 12, 1980, the second jury found Respondent guilty, again, of the murder of George Small. This time, as allowed by Article 37.07, Texas Code of Criminal Procedure (J.A. 54), the Respondent elected in writing to have the Court assess his punishment instead of the jury (J.A. 25).

The Trial Judge who had presided over both trials of Respondent assessed his punishment at 50 years confinement (J.A. 29). Thereafter, upon motion of the Respondent, the trial judge prepared and filed with the record written findings of fact and conclusions of law expressing a number of reasons why she assessed a greater punishment for Respondent than the first jury had set in the first trial (J.A. 33). Before stating her reasons for the greater sentence in the second trial, the judge pointed out that:

> The rule prohibiting the assessment of a heavier sentence upon re-trial under the circumstances set forth in *North Carolina* v. *Pearce*, 395 U.S. 711, 23 L.Ed2d 89, 656 S. Ct. 2072, and the cases following the precedent outlined in *Pearce* do not apply to this case because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial. (J.A. 33)

The reasons given in the Findings and Conclusions of the Judge (J.A. 33) substantiate the use of considerations apart from any indication of vindictiveness. Her reasons reveal that she considered matters appropriate to be considered by any trial judge in an original determination of an appropriate punishment.

In his appeal, the Respondent raised the question of the constitutionality of his sentence, even though the first sentence imposition was by a jury and the second by the judge. Neither the record, nor the briefs, nor any motion made by Respondent contain any allegation that the judge, who assessed the greater punishment, did so out of vindictiveness. Respondent's only complaint as to the greater sentence is that the trial judge failed to follow the prophylactic procedural rule recommended in *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed2d 656 (1969). He interprets that rule to require the application of all of the *Pearce* safeguards even in a situation such as ours, where no vindictiveness is alleged, and none is indicated in the evidence, and where no circumstances exist to raise any presumption of vindictiveness.

SUMMARY OF ARGUMENT

Due Process, under the Constitution, is satisfied in cases where a defendant successfully appeals from a sentence imposed by a jury, and in his second trial receives a more severe sentence from the judge who conducted both trials, under a system of state statutes giving every defendant the sole choice of judge or jury to assess his punishment in the event of a conviction.

The Presumption of Vindictiveness prescribed in the *Pearce* rule does not arise in such circumstances outlined above unless, perhaps, the defendant should elect to have the same judge assess his punishment in both trials. Even in that circumstance he would not be exposed to "chilling effects" that he could not by his own free choice avoid. The circumstances in our case reveal that the trial judge was not given the opportunity to invoke her own discretion in assessing punishment according to the evidence adduced during the first trial. The Respondent could avoid any possible chilling effect on his Due Process rights by electing to have another jury assess his punishment at this second trial. Under a statute such as ours, the right to this election removes the "chill". These distinctions make our case an exception to the "Presumption of Vindictiveness" rule announced in *Pearce*. Indeed, there is no reason for attempting to apply such a presumption in our case, where such a right of election is assured by statute.

Our case satisfies the same rationale this court expressed in its holding that Due Process is not offended in a case where a jury, after a successful appeal, sets greater punishment against a defendant than the jury did in his first trial. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 36 L.Ed2d 714, 93 S. Ct. 1977 (1973). In both cases, new untainted discretion was exercised in the second sentence.

Another reason not to find the presumption that arose in *Pearce* is that after the first trial our judge voluntarily

granted a new trial through the exercise of its own judgment. It was not forced into a new trial through any wrath-producing rebuke by an appellate court. Its actions in granting a new trial were based on its own judgment. Therefore, *Pearce* circumstances that might have motivated vindictiveness, or shocked away the right of appeal, did not exist.

A third distinction from the *Pearce* decision found in our record are the findings made by the trial judge (J.A. 33). When considered with our other distinguishing circumstances these findings are significant. They establish that the sentence set by the court did not arise from vindictive motives that might violate due process. One of them reinforces the first reason discussed in this summary that precludes any violation of due process. It is the finding that the court's discretion as to proper sentence, invoked for the first time, called for greater punishment than was determined by the first jury.

The elements recited above all serve to distinguish our case from the holding in *Pearce*.

ARGUMENT

I. INTRODUCTION

The enhanced sentence assessed against the Respondent in our case does not violate the principles expressed in *North Carolina* v. *Pearce*, 395 U.S. 711, 23 L.Ed2d 656, 89 S. Ct. 2072 (1969), because of the following factors that distinguish our case from *Pearce:*

1. Under our state statute allowing a defendant the right to elect a judge or jury to assess punishment, electing a judge at the second trial to exercise his discretion for the first time, after a jury has set sentence in a first trial, has no chilling effect upon the defendant's right of due process, regardless of the sentence that the judge may assess.

2. The voluntary grant of a new trial instead of experiencing a higher court's reversal prevented the vexing elements that would produce a presumption of vindictiveness.

3. The Court's reasons for the enhanced sentence, although not based entirely on the defendant's identifiable conduct *occurring after* the time of the original sentencing proceeding, clearly rebut any presumption of vindictiveness that may have arisen under the *Pearce* rationale.

4. The record does not contain any allegation or indication of vindictiveness by the court.

II. EXERCISE OF DISCRETION FOR THE FIRST TIME BY THE SENTENCING AUTHORITY

This case is the first occasion we have found for this court to determine whether having the statutory right to select either judge or jury to assess punishment cures the presumption of vindictiveness to which a defendant may be entitled under *North Carolina* v. *Pearce*, supra, growing out of an enhanced sentence by a trial judge following the granting by that judge of a new trial. As to whether Due Process is offended under such circumstances, could it depend on whom the defendant selects, or in what order of succession the selection is made? Justice should not be required to depend upon such manipulations by anyone motivated only by the desire to avoid punishment for his crime. Reason would make it appear that extending to defendants the sole privilege to select the sentencer should provide adequate warmth against the chilling aspects of an appeal.

In jurisdictions such as ours, the defendant has the power to have a jury assess his punishment at the second trial. He is thus assured of an impartial sentencing authority if he so desires. In *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 36 L.Ed2d 714, 93 S. Ct. 1977 (1973), this Court found that due process was not offended by the law in Georgia which provided for unrestricted jury sentencing in a second trial, in a case where the first jury assessed fifteen years and the second jury assessed life imprisonment. *Chaffin* established that if a state concludes that jury sentencing in criminal cases is preferable to judge sentencing, nothing in the due process clause of the fourteenth amendment intrudes upon that choice. By the same token, it should be the rule that when a state, instead of choosing and mandating that choice, grants to all defendants the sole choice of the sentencing authority, between judge or jury, coupled with a bifurcated trial in which the question of guilt is first determined, no chilling

effect upon the right to appeal would exist to unconstitutionally deter any defendant wishing to seek a new trial. This unrestricted right to choose his sentencer provides every defendant with the constitutional means to prevent the "chill factor" from having any effect upon his appeal plans.

Another significant similarity of the rule in *Chaffin*, where one jury assessed greater punishment in the second trial than was assessed by the first jury, to the rule we seek in our case, is shown in the following reasoning. In *Chaffin*, as in our case, the discretion of the determiner of punishment at the second trial had never been expressed. In our case, as in *Chaffin*, the discretion of the sentencer was invoked, for the first time, at the second trial — and in our case by the defendant's own unfettered choice. In *Chaffin*, more restrictions were upon the defendant. He had no choice of the sentencer. The reasoning in *Chaffin* applies strongly to our case. Some of that reasoning is found in the following quotation from that decision:

> While we reaffirm the underlying rationale of *Pearce* that vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or that due process of law does not require extension of the *Pearce* type restrictions to jury sentencing.

Chaffin, 412 U.S. 17, 18.

Neither should Pearce-type restrictions be extended to Judge sentencing in cases where the judge's discretion as to sentencing was not previously invoked and where the defendant held the "antidote" for any possible vindictive "poison" by being able to select his own sentencing authority.

One last, and very important aspect of *Chaffin* that should be emphasized is found in the following. Although the parties in *Chaffin* agreed that the jury was not aware of the length of the sentence meted out by the jury in the first trial, the court pointed out that the jury *was* informed by one of Petitioner's own witnesses that he had been "tried previously on the same charge". *Chaffin*, 412 U.S. at 21. This fact is similar to our situation where the same judge conducts both trials, but is only selected by the defendant to assess punishment at the second trial, following the first trial sentence by the jury. Under both situations the sentencing authority is aware that there was (a) previously a trial (b) a sentence, and (c) a successful appeal before the defendant approached the sentencer for assessment of punishment. Under these circumstances, where is the logic in presuming a jury to be free from vindictiveness and unconstitutional prejudice, and at the same time requiring a judge to rebut the presumption that he is guilty of such motivation? Logically, it appears that the facts available to our judge that could engender vindictiveness, under the reasoning in *Pearce* were equally available to the *Chaffin* jury, i.e. that the defendant there had been tried, convicted, then granted the new trial benefits to be derived from a successful appeal. The inescapable question arises, why should laymen jurors be entitled to a presumption of propriety which will not be accorded to a judge trained in propriety? The only answer is that this entitlement should not arise. To explain it by stating that the greater burden should be on the judge who is part of the system does not satisfy the question in our society where judges are taught to react reasonably, and not vindictively, to the morals of the marketplace. Nothing should prevent the sentencing authority who is assessing punishment for the first time, whether judge or jury, from exercising the discretion and range of punishment granted by law. The *Pearce* holding does not require such inconsistency in a comparison of the *Chaffin* facts to ours.

This Court, also, did not apply the *Pearce* presumption of vindictiveness to the circumstances of possible chilling effects of prosecutorial vindictiveness in *Bordenkircher* v. *Hayes*, 434 U.S. 357, 54 L.Ed2d 604, 98 S. Ct. 663 (1978). There, this Court held that due process was not implicated when the prosecutor threatened to seek a conviction of the defendant on a greater offense with greater punishment if the defendant did not plead guilty. In fact, the greater offense was, thereafter, charged, and the prosecutor proceeded to trial by jury in which the defendant was convicted and given a life sentence due to enhancement because of prior felony convictions. In *Bordenkircher*, as in our case, there was a choice available to the defendant. That choice, essentially, was in *Bordenkircher* to take the sure five year sentence first offered, or gamble on a higher one by choosing a jury trial to determine the forgery charge and also the prior convictions that might result in a life sentence enhancement. Our Respondent's choice was to take the 20 year sentence to which he was assured, or gamble on a higher or lower one by seeking a new trial; then, when the new trial was granted, without the intervention of any higher court, to select the sentencing authority which the respondent felt would be most lenient. These clear choices, with knowledge of the possibilities involved, in both *Bordenkircher* and our case, are similar to characteristics of several cases this court has called the "*Pearce* progeny". Those characteristics have been held to remove the chill that would violate Due Process.

In the case at bar, at the second trial, the respondent could, of course, have selected the jury to assess his punishment. Doing so would have avoided all possibility of any vindictiveness under the law of *Chaffin*, 412 U.S. 17. Instead, he chose the judge as his sentencing authority. Why did he make that choice? There may have been at least two reasons: (1) The respondent knew there was a very good possibility another jury could assess a greater sentence based solely on the brutal evidence involved at the trial; and (2) The respondent believed by electing the

trial judge to assess punishment he might be able to invoke the *Pearce* rationale and limit the upper range of punishment he could receive, and at the same time argue, perhaps persuasively, for a lesser punishment. None of these reasons are based on any denial of due process. According to the rationale of *Chaffin*, any concern with due process could be resolved by the respondent's own choice in electing a jury to assess punishment at his second trial.

Colten v. *Kentucky*, 407 U.S. 104, 32 L.Ed2d 584, 92 S. Ct. 1953, (1972), is another case in which the *Pearce* presumption was held not to apply. Its result is comparable to ours and should aid in an appropriate disposition of this case. A description of the circumstances in *Colten appears in the Chaffin*, supra, opinion at 412 U.S. 26, as follows:

> A similar focus on actual vindictiveness is reflected in the decision, last term, in *Colten* v. *Kentucky*, 407 U.S. 104. The question in that case was whether the *Pearce* principle applied to bar the imposition of a higher sentence after a de novo trial in those jurisdictions that employ a two-tier system of trial courts, while noting that it may often be that the de novo "appeal" court will impose a punishment more severe than that received from the inferior court, [Id., at 117, 32 L.Ed2d 584] we were shown nothing to persuade us that the hazard of being penalized for seeking a new trial, which underlay the holding in *Pearce*, also inheres in the de novo trial arrangement. Id., at 117, 32 L.Ed2d 584.

Chaffin went on to say that "in short, the Due Process Clause was not violated because the 'possibility of vindictiveness' was not found to inhere in the two-tier system". *Id.* Where does our case depart from the rationale in both *Colten* and *Chaffin*? No valid distinction can

arise. In fact, in our circumstances there is a stronger basis to absolve a judge, trained in tolerance, from vindictiveness than to forego the presumption in a jury that administers life imprisonment following a fifteen year sentence with virtually the same awareness of the history of the case, as occurred in *Chaffin*. No restraints should be placed on the trial judge the first time that judge exercises her discretion as to proper punishment *unless* the record affirmatively shows vindictiveness in the assessment.

In *United States* v. *Goodwin*, 457 U.S. 368, 73 L.Ed2d 74, 102 S. Ct. 2485 (1982), the question of prosecutorial vindictiveness arose. There, the court declined to apply the *Pearce* rule requiring reasons from the judge or prosecutor, where the prosecutor obtained an indictment and a conviction with much greater punishment after the defendant changed his mind on a plea bargain arrangement. There, the Court said:

> The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from government action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the court has found it necessary to 'presume' an improper vindictive motive. Given the severity of such a presumption, however — which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to

> criminal conduct — the Court has done so only in cases in which a reasonable likehood of vindictiveness exists.

Goodwin, 457 U.S. 372, 373

Goodwin is easily distinguishable from the circumstances and rationale found in the 1974 holding in *Blackledge* v. *Perry*, 417 U.S. 21, 40 L.Ed2d 628, 94 S. Ct. 2098. *Blackledge* is another case involving possible prosecutorial vindictiveness, similar to *Goodwin*, supra. However, in *Blackledge*, supra, where the *Pearce* presumption was held present and not rebutted, there were vital signs of vindictiveness without any constitutional explanation. Perry, the defendant, was an inmate in the North Carolina penitentiary. He assaulted another inmate. A jury trial ensued in which he was convicted and given a six-month sentence, to be served after his existing prison term. He elected to have a trial de novo in a superior court of North Carolina, which is permitted in that jurisdiction. No error in the first trial was required as a prerequisite to a trial de novo in that jurisdiction. Upon becoming aware that Perry had exercised his right to a trial de novo, but before Perry's appearance for same, the Prosecutor obtained from the grand jury a felony indictment charging Perry with an assault with a deadly weapon with intent to kill and inflict serious bodily injury. Perry pleaded guilty and received a sentence of five to seven years in the penitentiary to be served concurrently with his existing sentence for which he was confined. There, in *Blackledge*, the Court held that the initiation of the felony proceedings against Perry in the Superior Court, in which he was assessed the five to seven years sentence, thus operated to deny him due process of the law. In *Blackledge* there was a distinct act of vindictiveness; whereas our case demonstrates use of non-vindictive discretion. In *Blackledge* the prosecutor interrupted the exercise of an appellate right granted to the defendant. In our case, the Judge preserved that right when sought by respondent and did not

interfere with any choice granted to him by law. The distinctions we see between *Blackledge* and those such as our case — *Colten, Chaffin, Bordenkircher, Goodwin,* and *Wasman* v. *United States,* 468 U.S.__, 82 L.Ed2d 424, 104 S. Ct. __ where the presumption of vindictiveness was held not to apply, is simply that this motive — vindictiveness — was reflected in the very records of *Blackledge* as well as *Pearce;* whereas, in the record of those other cases mentioned above, where the Court refused to apply this presumption, there was no indication found that the courts or the prosecutors were so motivated. Like any presumption, it may be overcome by affirmative evidence appearing in the record.

> If it was not clear from the Court's holding in *Pearce,* it is clear from our subsequent cases applying *Pearce* that due process does not in any sense forbid enhanced sentences or charges, but *only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights.* In *Pearce* and *Blackledge,* the Court "presumed" that the increased sentence and charge were the products of actual vindictiveness aroused by the defendant's appeals. *IT HELD THAT THE DEFENDANTS' RIGHT TO DUE PROCESS WAS VIOLATED NOT BECAUSE THE SENTENCE AND CHARGE WERE ENHANCED, BUT BECAUSE THERE WAS NO EVIDENCE INTRODUCED TO REBUT THE PRESUMPTION THAT ACTUAL VINDICTIVENESS WAS BEHIND THE INCREASES.*
> [emphasis added by briefer]

Wasman, 468 U.S. __, 82 L.Ed 424, 433.

Under our facts, no constitutional basis exists for the application of the presumption of vindictiveness created in *Pearce. Pearce* should apply in those jurisdictions

where the defendant, following a successful appeal, elects the judge to assess punishment at the second trial and receives a greater sentence than given by the jury at the first trial ONLY where the record affirmatively shows that the greater sentence was assessed because of vindictiveness. There is absolutely no need for the presumption of vindictiveness to arise without such evidence appearing in the record.

We must remember that under our facts, our trial judge granted a new trial on the defendant's Motion for New Trial. Under these facts, the defendant cannot argue that vindictiveness should be presumed because the trial judge was forced into a new trial through any wrath-producing rebuke by an appellate court. Instead, the trial court, upon its own judgment, decided that a new trial was necessary. No basis for a presumption of vindictiveness should reasonably arise.

III. REFLECTION IN THE RECORD OF REASONS FOR INCREASED SENTENCE

Perhaps this court will find that the presumption of vindictiveness set forth in *Pearce* should apply whenever a judge assesses a greater sentence in the second trial following a successful appeal. If so, must this case fall under the presumption that the respondent was denied Due Process? Our answer is "no".

Perhaps the most prominent expression found in the *Pearce* opinion, and certainly the one that has attracted the most attention of both state and federal courts, appears near the end of that opinion. 395 U.S. 711, at 726. It appears to be a prescription applicable in cases where the conduct of the trial judge or prosecutor becomes motivated by vindictiveness to an extent likely to intimidate an accused to a point where he is forced to forego a constitutional right. That prescription is well known, but it bears repeating for our purposes here:

> In order to assure the absence of such a motivation [retaliatory motivation on the part of the sentencing judge] we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reason for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 395 U.S. 711, at 726

In several opinions since the *Pearce* holding, however, this court has discussed the *conclusion* actually reached

by *Pearce* regarding higher sentences in second, or de novo trials. Perhaps the clearest expression in the *Pearce* opinion that substantiates the conclusions reached in the cases sometimes called the *"Pearce progeny"* can be found in the conclusion arrived at by Justice Stewart in that opinion, to-wit:

> We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Cause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, 'in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities' [*Williams* v. *New York*, 337 U.S. 241, 245, 93 L.Ed 1337, 1341, 69 S. Ct. 1079]. Such information may come to the judge's attention from *evidence adduced at the second trial itself*, from a new presentence investigation, from the defendant's prison record, *or possibly other sources*. [emphasis ours]

Pearce, 395 U.S. at 723

In *Wasman*, 468 U.S. ____, 82 L.Ed2d 424, a Federal Judge assessed greater punishment in Wasman's second trial than he did in the first. The first sentence, for possession of counterfeit certificates of deposit, involved only 6 months imprisonment, whereas the second sentence assessed by the judge for that offense was two years confinement. The trial judge gave reasons for the greater sentence. The only reason indicated in the record was, simply, that Wasman had, on the first occasion of sentence, only one conviction [certificates of deposit] upon which to base and determine the sentence; whereas, on the second conviction and at the occasion for the

imposition of sentence there was a second conviction (for mail fraud) the charge for which had only been pending against Wasman at the time of his first sentence; and only the sentence and conviction for mail fraud occurred AFTER the original conviction. This court held that the *Wasman* record did not result in a presumption of judicial vindictiveness.

The record in our case clearly reveals that the trial judge's conduct, when respondent selected her to assess his punishment, followed the pathway outlined by the *Pearce* holding quoted above. Indeed, the conduct of the trial and the reasons that the trial judge gave, in our case, also reflect compliance with the "prophylactic" prescription of Pearce. The *Wasman,* supra, case recites a significant quotation made by this court, quoting the 11th Court of Appeals, bearing on this element of our argument, to-wit:

> The Court of Appeals read *Pearce* to be concerned only with vindictive sentencing, not defendants misbehaving between trials.

Wasman, 468 U.S. ___, 82 L.Ed2d 429.

Elsewhere in the *Wasman* opinion this Court said:

> It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Justice Black made this point when, writing for the court in *Williams* v. *New York,* 337 U.S. 241, 247, 93 L.Ed.1337, 69 S. Ct, 1079 (1949) he observed that 'Highly relevant — if not essential — to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.' Allowing consideration of such a breadth of information ensures that the punishment will suit, not merely the offense, but the individual defendant.

Wasman, 468 U.S. ___, 82 L.Ed2d 430.

Our record in the case at bar reflects a number of relevant reasons given by the trial judge as to why she assessed greater punishment. All of them are logical and are supported by other portions of the record. They strongly assert no judicial vindictiveness. An examination of those reasons demonstrates an original exercise of discretion by the trial judge and not that the enhanced sentence was motivated by any vindictiveness. More importantly, those reasons also reflect that the new sentence by the trial judge was arrived at in the light of events subsequent to the first trial that did throw "new light upon respondent's life, health, habits, conduct and mental and moral propensities". Those events included information for the first time from witnesses and from respondent's conduct and demeanor during the second trial. Beginning at page 33 of the Joint Appendix accompanying this brief are found the trial judge's reasons, establishing her basis for the greater sentence. We summarize this as follows:

1. In 1(a) on P. 33, Joint Appendix, the judge highlighted the testimony of two witnesses who did not testify at the first trial. The significance she attributed to their testimony is that it directly implicated the respondent in the actual commission of the murder of the victim, more strongly establishing respondent's having administered the death blows to the victim. (Carolyn Sue Hollison McCullough, S.F., Vol. I, Cause 3442-C, PP. 148-160) (Willie Lee Brown, S.F., Vol. I, Cause 3442-C, PP. 129-147) Thus, respondent was more established in the Judge's

mind, in the second trial, as a direct participant in the victim's murder than in the first trial, where his participation in causing the victim's death was not as certain.

2. In 1(b) through (g) of her reasons, the references made by the trial judge to various witnesses (J.A. 34 [c]) whose testimony confirmed the wounds discovered by the coroner to have been inflicted by the Respondent gave stronger indications in the second trial to the propensities of respondent toward brutality and the resulting threat to society.

3. In the second section of her reasons for assessing greater punishment, our trial judge made reference to having learned during the second trial that respondent was only four months out of the Texas Department of Corrections when he committed this murder (J.A. 34 [2]). This appeared to be a reference to the absence of any reformation in the life of respondent resulting from the previous imprisonment, and was a sound motive, not indicative of vindictiveness, for enhancement of the jury's original determination of punishment.

4. In her third section of the reasons for the enhanced sentence, our trial judge revealed what is reflected in many of the opinions of this court, that reasonable minds vary as to appropriate punishment. This judge candidly expressed the fact that "if the defendant had elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury". Since the absence of judicial vindictiveness on the part of the judge in imposing sentence is the cardinal consideration in our case at bar, what could be more clear in showing its absence than for the court to indicate its own conclusions as to what appropriate punishment would be for the crime for which respondent had been convicted, dispelling any such motivation.

5. The absence of remorse on respondent's part was observed and expressed by the court in some of the reasons expressed for the enhanced sentence. It was reflected in the respondent's attitude and reactions during the second trial. These should be matters appropriately regarded by any sentencing authority in the consideration of an appropriate sentence. Is any precedent required to substantiate that one purpose of punishment is to reform? The absence of remorse is indicative of no reformation. This remorselessness blends with the court's findings that the respondent's lifestyle, habits, and conduct threatened society to the extent that the appropriate punishment would be 50 years confinement.

The foregoing reasons sufficiently overcome any presumption of vindictiveness created under *Pearce* and affirmatively show the reasons for the sentence assessed by the trial judge, when first exercising her discretion as to a proper punishment for respondent's having committed this brutal crime. Any presumption of vindictiveness that might have arisen has been negated by the evidence as to motivation of the judge in her determination of the appropriate sentence for respondent.

IV. ABSENCE OF ALLEGATION OF VINDICTIVENESS

Respondent has not alleged that the trial judge was vindictive in either of his trials.[1] His appeal in the courts below contended, only, that our case is "automatically" tainted with the presumption of vindictiveness. That contention results from a mistaken impression as to what *North Carolina* v. *Pearce,* supra, holds. Given the facts and statutory privileges of the defendant in our case, an allegation of, or some showing of vindictiveness on the part of the court is necessary. An enhanced sentence set by the judge at a second trial is not an indication of vindictiveness, violating due process, where the judge's discretion has never before been invoked in the determination of a proper sentence, and where the defendant selected the sentencing authority.

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[1] Respondent's original "Appellant's Brief" filed in and part of the record of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in No. 07-81-0141-CR, reveals that Respondent's Third Ground of Error alleged nothing more than the court's omission of its reasons for the higher sentence based on objective information as to events occurring after the first trial, and that the Respondent never expressed any indication or allegation that charged the trial judge with being motivated by vindictiveness.

Moon v. *Maryland,* 398 U.S. 319, 26 L.Ed2d 262, 90 S. Ct. 1730 (1970), followed on the heels of *Pearce. Moon* is authority for the conclusion that unless there are allegations of vindictiveness on the part of the trial judge, its presence will not be presumed to have motivated an enhanced sentence following successful appeal. First, in *Moon,* this Court said that it granted certiorari because the record contained no findings by the trial judge indicating compliance with the objective information regarding defendant giving rise to the higher sentence. However, in its Per Curiam opinion, after an affidavit

had been attached to the Respondent's, Maryland's, brief through which the trial judge supplied written reasons for the higher sentence, this court went on to say:

> Those reasons clearly include 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' *But the dispositive development is that counsel for the Petitioner has now made it clear that there is no claim in this case that the due process standard of Pearce was violated. As counsel forthrightly stated in the course of oral argument, 'I have never contended that Judge Pugh was vindictive'.* Accordingly, the writ is dismissed as improvidently granted.
> [emphasis added]

Moon, 398 U.S. at 320

This holding in *Moon* makes it clear that any presumption of vindictiveness that might arise out of a judge's imposition of a higher sentence than he imposed at the first trial does not arise when there is no accusation by the defendant of vindictiveness, and no indication thereof in the trial record.

CONCLUSION

In Conclusion, we submit that the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, and the Court of Criminal Appeals of Texas did not correctly apply the law, as determined by this Court, to the trial judge's compliance with the Due Process clause of the Fourteenth Amendment in the trial court's determination of the fifty year sentence assessed against respondent for the murder of George Preston Small.

For the foregoing reasons, the petitioner respectfully requests that the judgment of the Texas Court of Criminal Appeals be reversed.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a presumption of vindictiveness attaches when the trial judge grants the defendant's motion for new trial, the defendant elects to be sentenced by the judge, and the judge imposes a higher sentence than that imposed by the jury at the first trial.

2. Whether a presumption of vindictive sentencing can be rebutted by reliance for an increased sentence on evidence of a defendant's conduct prior to his first trial which is adduced at his second trial.

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STATEMENT

1. Following a jury trial, Respondent was convicted of murder, in violation of Texas Penal Code Ann. § 19.02 (Vernon 1974). Pursuant to Tex. Code Crim. Proc. Ann. art. 37.07 (Vernon 1981 & Supp. 1985), Respondent elected to be sentenced by the jury that decided his guilt. The jury imposed a sentence of 20 years imprisonment. Thereafter, Respondent filed a motion for new trial, alleging improper jury argument and improper cross-examination by the prosecutor (J.A. 17-18). The judge granted the motion.

In December 1980, Respondent was retried before a new jury, but with the same judge presiding, and he was once again convicted of murder. This time, however, Respondent elected to be sentenced by the trial judge, who imposed a sentence of 50 years' imprisonment. Respondent moved for the entry of findings of fact explaining the increased sentence, which the judge did (J.A. 33-35), although first expressing her conclusion that the prophylactic rule of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), was not applicable "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial" (J.A. 33).

The judge nevertheless went on to place on the record certain findings in the event the appellate court disagreed with her on the applicability of *Pearce*. She relied principally on "newly developed evidence" that was presented for the first time at the second trial. The judge specifically focused on the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Lee Brown, which "directly implicated the [Respondent] in the commission of the murder in question and showed what part he played in committing the offense" (J.A. 33). The judge found that their testimony "shed new light upon the [Respondent's]

life, conduct, and his mental and moral propensities" and provided "insight as to * * * [Respondent's] propensity to commit brutal crimes against persons and to constitute a future threat to society" (J.A. 34). The judge also noted that she learned for the first time at the second trial that Respondent had been released from prison only four months before the crime occurred (ibid.). The judge further observed that Respondent had never exhibited any signs of remorse upon retrial and never "show[ed] this court any sign or intention of refraining from criminal conduct in the future" (J.A. 35). In addition, the judge stated that she would have sentenced Respondent to more than 20 years at the first trial had Respondent not elected to be sentenced by the jury (ibid.).

2. The Court of Appeals for the Seventh Supreme Judicial District of Texas affirmed Respondent's conviction but vacated his sentence, holding that the increase violated *Pearce* (J.A. 36-42). Distinguishing *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the court held that the increase in Respondent's sentence at retrial gave rise to a presumption of vindictiveness because that sentence had been imposed by a judge who knew of the first sentence, rather than a jury. The court ruled that the presumption was not rebutted by the judge's findings (J.A. 41). Accordingly, the court resentenced Respondent to 20 years imprisonment, the sentence imposed by the jury at the first trial (J.A. 42). On motion for rehearing, the court reaffirmed its holding that a presumption of vindictiveness applied in this case, deeming it immaterial that Respondent's new trial was granted by the trial judge herself, rather than on appeal (J.A. 44).

3. The Texas Court of Criminal Appeals granted review on its own motion to determine the authority of the court below to reform Respondent's sentence. The court

concluded that, as a matter of procedure, the Court of Appeals should not have reformed the sentence, but instead it should have remanded the case to the trial court for resentencing. The court did not question, however, the holding of the lower court that Respondent's increased sentence violated his right to due process. (J.A. 45-46).

On the State's motion for rehearing, the Court of Criminal Appeals addressed the question whether vindictiveness should be presumed "where a jury assesses punishment at the first trial, and a judge assessed punishment upon retrial" (J.A. 50). The court concluded that "the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" [J.A. 48-49 (footnote omitted)]. In so ruling, the court explained that the reasons given in *Chaffin* v. *Stynchcombe*, 412 U.S. at 26-27, for excluding jury sentencing from the *Pearce* rule were not applicable here (J.A. 50-51). The court added that it considered it irrelevant that Respondent could have chosen to be sentenced by a jury and in fact had done so at his first trial, rejecting the State's contention that the *Pearce* presumption does not attach when a different sentencing authority assesses the punishment on retrial.

SUMMARY OF ARGUMENT

I.

The Texas courts properly applied the *Pearce* presumption to this case.

The *Pearce* presumption is engaged whenever there is a hazard that vindictiveness may play a role in resentenc-

ing. *Blackledge* v. *Perry*, 417 U.S. 21 (1974). There was such a hazard in this case.

It made no difference that Respondent got his second trial by filing for a motion for new trial rather than an appeal. Under Texas law, a motion for new trial is a form of post-trial review. When Respondent filed his motion he was attacking the judge for giving him an unfair trial. He faced the same risk that any other defendant challenging a conviction would. He was entitled to the same protection.

Similarly, the fact that a jury imposed the first sentence and the judge the second is of no importance. The judge had a personal and professional stake in the outcome of the case. There was a genuine risk that vindictiveness might play a role in the resentencing process.

Finally, according to the Texas courts, Respondent had a right to freely choose his sentencer at the second trial without fear of vindictiveness. Because of this ruling on state law the Court is unable to reach the question of whether this choice made the *Pearce* presumption inapplicable. Even if this question could be reached, however, it would make no difference. A defendant cannot waive the right to be free from judicial vindictiveness nor can he be forced to forfeit his right to due process of law because he exercised the right to choose his sentencer.

There was a hazard that vindictiveness could play a role in the assessment of Respondent's sentence on retrial. The *Pearce* presumption was properly applied.

II.

The Texas courts properly held that the *Pearce* presumption was not rebutted by the findings made here.

The Court cannot consider this issue. Texas abandoned this argument in the state courts. When this case was presented to the Texas Court of Criminal Appeals the state limited its argument to the issues described earlier. Thus, this question was never presented to the Texas Court of Criminal Appeals. Consequently, it is not properly before the Court. *Ellis* v. *Dixon*, 349 U.S. 855 (1956).

In any event, the decisions below were correct.

A second sentencing authority may justify an increased sentence by relying on relevant conduct or events that occurred after the original sentencing proceedings. *Wasman* v. *United States*, No. 83-173 (July 3, 1984).

That is not what happened here. The trial judge here based her decision on conduct that occurred *before* the first sentencing proceeding but which was not revealed until the second trial. Under the decisions of the Court in *Pearce* and *Wasman* this was not permissible.

Consequently, Texas wants the Court to create a new rule which would allow consideration of this sort of information. The Court should not establish such a rule.

Evidence adduced at second trials will often appear to be more damaging to the defendant. Frequently, however, this will be a matter of appearances only and the evidence will be merely cumulative of information brought out at the first trial. Allowing trial judges to justify sentence increases on the basis of such information would disserve the due process goals of *Pearce*.

It would enable improperly motivated judges to conceal their true motives with ease. Consequently, adoption of the rule Texas seeks would increase the risk that vindictiveness may play a role in resentencing.

Creation of the rule Texas seeks would also resurrect the other evil *Pearce* sought to destroy. Defendants would be deterred in exercising their rights to appeal due to fear of vindictiveness. Access to appellate review would no longer be unfettered.

Because the rule Texas wants would frustrate the due process goals *Pearce* sought to achieve it should be rejected.

Adoption of this rule is not necessary on the ground that without it unjust results will occur. The limited instances in which injustice would be caused through application of existing law are too isolated to justify abandoning the *Pearce* prophylaxis.

ARGUMENT

THE TEXAS COURTS DID NOT ERR IN RULING THAT THE INCREASED SENTENCE ON RETRIAL IN THIS CASE VIOLATED DUE PROCESS.

I. THE TEXAS COURTS PROPERLY APPLIED THE *PEARCE* PRESUMPTION IN THIS CASE.

The first issue in this case is whether the presumption of vindictiveness established by *Pearce* should have been applied below.

Texas says it should not have been because of three reasons.

First, it argues that since the retrial in this case was granted by the trial judge and not an appellate court the presumption should not be used.

Next it contends that because a jury, not the judge, gave the first sentence the presumption does not apply.

Finally it urges that since the Defendant decided to let the judge, not a jury, assess punishment on retrial *Pearce* does not apply.

None of these reasons are significant enough to take this case outside the scope of *Pearce*. None of them provide a reason not to apply the presumption of vindictiveness.

To understand why it is first necessary to review *Pearce* and the way it has been interpreted by this Court.

North Carolina v. Pearce

In *Pearce* the Court said:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. *Pearce*, 395 U.S. 711, 725 (1969).

These considerations led the Court to develop a procedure for the lower courts:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitu-

> tional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

Thus, the "presumption of vindictiveness" is something that must be applied by a reviewing court whenever a defendant fights his conviction, gets a new trial and is given a higher sentence the second time. *Id.* at 723, 726.

***Subsequent Interpretation:* Colten *and* Chaffin**

There are, however, certain situations in which there is no need to apply the presumption.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), the Court held that the presumption is not necessary in a two-tiered system designed to dispose of minor offenses. There, a defendant could appeal from a conviction in a lower court without alleging any error in the proceedings. *Id.* at 112. A trial de novo was automatic. "The case [was] to be regarded exactly as if it had been brought there in the first place." *Id.* at 113. In order to justify the new trial, a defendant did not need to attack the conduct of the first trial in any manner. Additionally, the court which conducted the second trial and imposed the final sentence was not the court "with whose work Colten was sufficiently dissatisfied to seek a different result on appeal"; a defendant in the Kentucky system was not in the position of asking the first court to "do over again what it thought it had already done correctly." *Id.* at 116-17. Because of these factors, and because of the recognition that the lower courts in the Kentucky system were not "designed or equipped to conduct error-free trials or to insure full recognition of constitutional freedoms," the Court concluded there was no realistic likelihood that vindictiveness could play any part in the Kentucky resentencing scheme. Because there was no risk of vindictiveness, it followed that no defendant would reasonably be deterred from exercising his right to appeal *Id.* at 116.

In *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the Court did not apply the *Pearce* presumption where a jury assessed the sentence in the second trial. The presumption did not apply for three reasons: (1) the jurors were unaware of the first sentence; (2) the jurors, unlike a resentencing judge, had no reason to try to vindicate the first judge who failed to try the case properly; (3) the jurors, again unlike judges, had no professional interest in the workings of the criminal justice system and would not be inclined to discourage appeals for the sake of efficiency. *Id.* at 27. Because of these factors, there was virtually no chance that a jury would punish defendants for successfully appealing their convictions. Because there was no genuine risk of vindictiveness in the resentencing process, it could not be said that the system would unconstitutionally deter defendants from appealing their convictions. *Id.* at 28.

Thus, the *Pearce* presumption of vindictiveness applies only in those situations where there is a likelihood that vindictiveness may play a part in resentencing and thus deter a defendant from exercising his right to appeal. *Blackledge* v. *Perry*, 417 U.S. 21 (1974). The test to use in determining whether the *Pearce* presumption applies is to ask whether in a given case a defendant runs the *risk* of being penalized for seeking a new trial. *Chaffin*, 412 U.S. at 26. If there is any such hazard, then the *Pearce* presumption should be used.

With this test in mind, the arguments advanced by Petitioner can be addressed.

A. The *Pearce* Presumption Should Apply Regardless Of Whether The Second Trial Follows A Motion For New Trial.

The Petitioner argues that because the Respondent's retrial was the result of his filing a motion for new trial, the presumption should not apply.

After his first trial, Respondent filed a motion for new trial, alleging that the trial court had allowed improper jury argument and allowed the State to use a co-defendant's confession in violation of *Bruton* v. *United States*, 391 U.S. 123 (1963).

In Texas, a defendant may file such a motion only after the trial court has entered judgment against him. *Trevino* v. *State*, 565 S.W.2d 938 (Tex.Crim.App.1978). Through this motion the defendant may challenge the trial verdict by alleging specific types of errors. See Tex. Code Crim. Proc. Ann. art. 40.05 (Vernon 1981 & Supp. 1985).

The Texas courts view the procedure as part of the post-trial review process. The filing of a motion for new trial is not regarded as an incident of the trial itself:

> . . . all trial issues have been decided by the time for the motion for the new trial. That the hearing on such a motion is for the purpose of deciding whether the cause shall be retried (see Arts. 40.01, 40.07, 40.08, U.A.A.C.P.) and to prepare a record for presenting issues on appeal in the event the motion is denied (see Special Commentary to Article 40.09 cited above) demonstrates that it is part of the post-trial review process.

Trevino, 565 S.W.2d at 938.

Thus, McCullough had begun to seek post-trial review of his conviction when he filed this motion. He had challenged the judge for giving him an unfair trial.

As it happened, the judge acquiesced. Respondent's motion was granted. He now faced another trial before the same judge.

Texas argues that there was no hazard of vindictiveness in this situation. It urges that the distinction between a retrial after appeal, as in *Pearce*, and a retrial after a

motion for new trial, as here, is great enough to remove this case from the ambit of *Pearce*.

Texas advances several reasons to support this argument. The Solicitor General briefs them thoroughly. Amicus urges that in the Texas motion for new trial context: (1) the sentencing court is not being asked "to do over again what it thought it had already done correctly" (*Colten*, 407 U.S. at 116, 117); (2) the sentencing judge has not been criticized by another judge; (3) the judge cannot feel burdened by a retrial when it is he who granted the motion that brought it about; (4) there are no institutional biases against retrials in this setting; and (5) the fact that it was the sentencing judge himself who granted the trial "strongly indicates" a fair disposition toward the Defendant. These reasons are not persuasive. In the Texas context the court *is* being asked to "do over again what it thought it had already done correctly" when a defendant files a motion for new trial. Although no judge is criticizing the sentencer the defendant is. The judge's professional interest in conserving resources could easily cause him to feel burdened by a new trial. Finally, although a judge who grants a motion for new trial may have done so out of fairness to the defendant he may also have done it due to fear of an appellate rebuke or to conceal a retaliatory motivation. Thus, none of the reasons advanced are strong.

Moreover, they and the argument they support reflect an overly mechanical approach to the problem. The issue is not whether a list of isolated "factors" makes one case more like another. The issue is whether in this case there was a risk that vindictiveness might play a part in the resentencing process.

Given Respondent's situation the answer must be that there was such a risk. He had to decide whether to attack

the fairness of the judge who had tried his case by filing the motion. Unlike the defendants in *Colten* and *Chaffin* his "slate" would not be "wiped clean" if he succeeded because he would be back before the same court. *Colten*, 407 U.S. at 117. Unlike the defendants in *Colten* and *Chaffin*, he would be before a sentencer who had both reason and opportunity to punish him for exercising his rights. It cannot be said that there was no hazard of vindictiveness in this situation.

There is another flaw in this argument. It overlooks the language of *Pearce* itself. The Court in *Pearce* forbade unjustified sentence increases "after a new trial." *Pearce*, 395 U.S. at 726. The rule was created so that defendants could make free choices using whatever means were available to attack their convictions. *Pearce*, 395 U.S. at 724, citing *Worcester* v. *Commissioner*, 370 F.2d 713 (1st Cir. 1966).

Thus, ". . . the rationale for the rule applies with equal force to defendants considering whether to exercise their right to move for a new trial." *United States* v. *Monaco*, 702 F.2d 860, 884 (11th Cir. 1983) (*Pearce* applies to federal defendants filing motions for new trial).

The argument that *Pearce* should not be applied where the defendant's second trial follows the granting of a motion for new trial is unsound.

B. The *Pearce* Presumption Should Apply Regardless Of Whether The Jury Imposes The First Sentence.

The second argument against applying the *Pearce* presumption here is that because the jury, not the judge, imposed the first sentence, there was no reasonable likelihood of vindictiveness. For the reasons shown below, this argument is incorrect.

This argument is based squarely on the idea that the main reason why a judge would be vindictive in a given case would be his personal stake in the proceedings.

Therefore, the argument goes, when the personal stake of the judge is removed from the proceedings the likelihood that vindictiveness will play any part in the resentencing of the defendant is *de minimis*. Thus, since there would be no realistic likelihood that vindictiveness could occur there would be no need to afford the defendant the protection of *Pearce*.

This argument has no application to the facts of this case. It is true that the first sentence was assessed by a jury and the second by the judge. It is not true, however, that the judge had no personal stake in the outcome of the case.

Here, the defendant had asked the same judge to "do over again what [she] thought [she] had already done correctly" (*Colten*, 407 U.S. at 117). He had attacked her ability to try his case fairly.

The trial judge here actually had a greater personal stake in the outcome of the case than the judge in *Pearce*. Unlike *Pearce*, here it was the same judge whose first sentence had been overturned that was being asked to assess punishment after the second trial. See *Hardwick* v. *Doolittle*, 558 F.2d 292, 299 n.3 (5th Cir. 1977).

This argument must be rejected.

C. The *Pearce* Presumption Should Apply Regardless Of Whether The Defendant Chose To Have The Judge Assess Punishment On Retrial.

The final argument against applying the *Pearce* presumption in this case is that here the defendant himself

chose to be sentenced by the judge whom he had previously attacked.

This argument is unsound for two reasons.

First, it cannot be considered by the Court. This Court is bound by decisions of state courts on matters of state law. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945). In Texas, Article 37.07 (2)(b) of the state Code of Criminal Procedure gives the defendant the right to elect whether judge or jury will assess his punishment (J.A. 54). The Texas Court of Criminal Appeals has previously construed this provision to mean that "as long as the legislature allows defendants to elect between jury or judge punishments, defendants should be allowed to make that choice without fear of vindictiveness", *McCullough* v. *State*, No. 351-83, Dec. 5, 1984 (Tex.Crim.App.) (on State's Motion for Rehearing) (J.A. 52). This is nothing if not a state court decision on a question of state law. Consequently, inquiry into this issue is foreclosed by established principles of judicial review.

Even if inquiry could be made, however, the argument would have to be rejected.

To see why it is necessary to consider the true nature of this position. The idea that giving a defendant the right to choose his sentencer should prevent the application of *Pearce* is unique. It does not derive from a theory that the opportunity for such a choice removes a likelihood that vindictiveness may play a part in resentencing. It is instead based on a "waiver" analysis:

> . . . to the extent respondent was exposed to any danger of vindictive sentencing it was solely as a result of his choice of sentencer. Respondent could have avoided any possibility of vindictive sentencing simply by choosing to be sentenced by the jury, as he had done at the first trial.

(Brief of Solicitor General, 18-19).

This argument is wrong.

It asks the Court to condone a situation in which a defendant would forfeit his right to be free from vindictiveness because he exercised the right to choose his sentencer. This sort of "trade-off" is not constitutionally permissible. In *United States* v. *Jackson*, 390 U.S. 570 (1963), the Court condemned such an arrangement when it held that the federal kidnapping statute was unconstitutional because it made death the price of a jury trial:

> Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous to seek a jury acquittal stands forwarded, that if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such death penalty applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Id. at 577.

To hold that *Pearce* does not apply when a defendant can choose his sentencer would be to create the same sort of situation denounced in *Jackson*.

Moreover, the Court has made it unmistakably clear that vindictiveness must play no role in the criminal trial process. *Pearce*, 395 U.S. at 724. To legitimize it on the ground that the defendant asked for it, which is what this argument wants the Court to do, would be repugnant to the principle of due process.

This argument must be rejected.

II. THE TEXAS COURTS PROPERLY HELD THAT THE *PEARCE* PRESUMPTION WAS NOT REBUTTED BY THE FINDINGS HERE.

The second major question presented by this case is whether the *Pearce* presumption may be rebutted by evidence of a defendant's conduct before his first trial which is brought out at his retrial.

All of the reasons used to justify the sentence increase here were based on such evidence. (J.A. 33-35).

Texas argues that resentencing courts should be permitted to do this.

Before reaching this argument, however, it must be noted that this position cannot be considered by the Court because Texas has waived its right to present it.

This argument was not presented to the Texas Court of Criminal Appeals. Under Texas procedure, both the state and the appellant may appeal to the Court of Criminal Appeals by filing a petition for discretionary review. See Tex. Code Crim. Proc. Ann. art. 44.45 (Vernon 1981, Vernon Supp. 1985). The Court may also grant review on its own motion. *Ibid.* Here the Court of Criminal Appeals reviewed the case on its own (J.A. 45-46). The state chose not to contest the decision of the Court of Appeals until it filed a motion for rehearing:

> The question presented on state's motion for rehearing is whether the presumption of vindictiveness established by *North Carolina* v. *Pearce*, (citation omitted) . . . is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.
>
> * * *
>
> The state does not contend on rehearing that the trial court's findings of fact in support of the increased sentence satisfy *Pearce* (citation omitted). Rather, the state asserts that *Pearce* is inapplicable when a jury first assesses punishment and a judge subsequently assesses punishment upon retrial.

(J.A. 50). Because the issue was not presented to the Texas Court of Criminal Appeals, the question is not properly before this Court and should not be considered. *Ellis* v. *Dixon*, 349 U.S. 458 (1955), rehearing denied, 350 U.S. 855 (1956).

Assuming arguendo that Petitioner's argument can be considered it must be rejected nonetheless.

To understand why it is first necessary to review the decisions of the Court in *Pearce* and *Wasman* v. *United States*. No. 83-173 (July 3, 1984).

From Pearce *to* Wasman

It must be remembered that the rule of *Pearce* was created to fight two evils in the resentencing process: vindictiveness and the fear a defendant may have of vindictiveness. *Pearce*, 395 U.S. at 725.

To prevent these problems the Court mandated this rule:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new

> trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

Experience has proven the language in *Pearce* concerning the kind of information which may be considered to be cumbersome.

Thus, in *Wasman* the Court interpreted and re-defined the rule.

There, the defendant was convicted of criminal passport violations and sentenced to two years confinement, six months to be served and the rest suspended in favor of three years probation. At the time of the original sentencing, Wasman had pending against him charges involving the possession of counterfeit certificates of deposit. At the sentencing hearing on the first conviction, the trial court was careful to note that it was not taking into consideration the pending charges. *Wasman*, slip op. 2.

After his first conviction was reversed, Wasman was retried, convicted and sentenced to two years in prison. The trial judge noted that while he had not considered the pending charges before, he would consider them at the second hearing because they had ripened into a conviction. *Id.* at 3.

Wasman argued on appeal that his sentence increase was void. He urged a narrow construction of the *Pearce*

language, arguing that it allowed consideration only of misconduct between trials. *Id.* at 4.

The Court of Appeals disagreed and held that such a rigid limitation would needlessly erase relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness. An intervening conviction, said the Court of Appeals, adds a new dimension to the data before a sentencing judge *who had disregarded charges already pending* at the time of the earlier sentencing hearing. *Wasman* v. *United States*, 700 F.2d 663, 670 (11th Cir. 1983).

On certiorari, the Court agreed. The Court held that:

> . . . after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.

Wasman, slip op. 9.

Under the *Wasman* holding the findings entered here are insufficient to rebut the presumption of vindictiveness, since none of them are based on objective information related to conduct or events occurring subsequent to Respondent's original sentencing. (J.A. 33-35). All of the "findings" relate to events which occurred before the first sentencing. With one exception—finding number two—they are all based on subjective impressions rather than objective data. (J.A. 33-35).

What Texas Wants

What Texas seeks is the creation of a new rule which would make these "findings" sufficient. This rule would allow the resentencing authority to justify an increased sentence by reliance on events which occurred *before* the

original sentencing proceedings but were not evidenced until the second trial. The Court should neither create such a rule nor approve what happened in this case. To do so would resurrect the problems *Pearce* tried to solve. Further, the creation of such a rule is not necessary to prevent unjust results from occurring.

To understand why this is true it is first necessary to look at some realities of the criminal trial process in general and this case in particular.

Some Realities of the Trial Process

As the Court has noted, by the end of a defendant's first trial the authorities have likely "discovered and assessed all of the information against an accused and [have] made a determination . . . of the extent to which he should be prosecuted." *United States* v. *Goodwin*, 457 U.S. 368, 381 (1982).

Nonetheless, the prosecution will frequently be able to present a stronger case at the second trial. By then, the accused will have revealed his defenses. Evidence favorable to him will be in the hands of the prosecutors. The prosecution will be more prepared. Its witnesses will be more at ease. Their courtroom presentations will be more persuasive.

Consequently, by the end of the second trial the record will often appear to weigh more heavily against the defendant.

Frequently, this will be a matter of appearances only. Often, the damaging evidence adduced at the second trial will only be cumulative of the evidence brought out the first time.

This is what happened here. A close examination of the records of both trials reveals that there were virtually no differences from one trial to the next in the testimony concerning Respondent's conduct.

The state did present two new witnesses at the second trial. These witnesses testified that McCullough admitted to them that he had cut the victim's throat (Vol. 1, second trial, p. 133, 140 and 150). This was not new information. It only corroborated testimony from the first trial (Vol. 1, first trial, p. 258).

The only other "new" fact about McCullough's conduct which came out at the second trial was his admission that he had been out of prison only four months before he committed the crime (Vol. 1A, second trial, p. 230). Analysis of the record from the first trial reveals that this same information was presented, albeit differently, at that time (Vol. 2, first trial, p. 347). Analysis of the record also shows that in any event all this information was known to the state at the first trial.

Essentially, then, the prosecutors managed to put together a stronger case against McCullough at his retrial. It was not a new case. It was only a case that looked better because it was a rehash of the first.

Of course, some cases may become considerably stronger than this one did when retried.

These situations will occasionally arise. Nonetheless, common experience teaches that normally the prosecution will have presented its complete case against an accused by the end of the first trial. *Goodwin*, 457 U.S. at 381. The sort of situation discussed here would occur infrequently.

With this context in mind it is possible to consider the arguments against creating the rule Texas wants.

A. If The Court Adopts The Rule Texas Wants There Will Be A Greater Likelihood That Vindictiveness Will Play A Role In Resentencing.

If a resentencing judge is allowed to increase a defendant's sentence solely on the basis of information brought out at his second trial there will be a greater likelihood that actual vindictiveness will infect the sentencing process than there is now.

As discussed earlier, the evidence brought forth at a second trial will often appear to be more damaging to the defendant.

Thus, it would be easier for a judge bent on vindictiveness to conceal his motives by claiming that the cumulative evidence shed new light on a defendant's "life, health, habits, conduct, and mental and moral propensities." *Pearce*, 395 U.S. at 723.

It takes little imagination to see how easily an improperly motivated judge could cloak his retaliatory design by relying on such "findings."

Such findings would often be vague. Here, for example, the trial judge partially justified the stiffer sentence on the basis of the "fact" that Respondent "showed no remorse" at the second trial (J.A. 35). Such a "fact" could easily be used as a veil to conceal vindictiveness.

It would be extremely difficult to disprove such a "finding" on appeal, particularly in view of the deference normally paid trial courts by appellate tribunals. *Pearce*, 369 U.S. at 725.

The task of determining the sufficiency of such findings on appeal would be great. Undoubtedly a tangled skein of conflicting decisions as to what factors were sufficient would develop. Confusion and disharmony would occur.

In addition, the chore of sifting through and comparing various trial records would add to the increasing burdens now imposed on state and federal appellate courts.

The net effect of adopting the rule Texas wants would be to increase opportunities for judicial vindictiveness. One of the evils this Court sought to combat in *Pearce* would return.

B. If The Court Adopts The Rule Texas Wants Defendants Will Be Hampered In The Exercise Of Their Right To Appeal.

If the rule Texas desires becomes law another evil *Pearce* sought to destroy will return. Defendants will be deterred from exercising their rights to appeal.

If the Court adopts the rule Texas wants there will be greater dangers of vindictiveness than before. Consequently, defendants will tend to be deterred from challenging their convictions. *Blackledge*, 417 U.S. at 29.

This problem has always been of great concern to the Court:

> Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to appeal or to attack collaterally their conviction. Those actually subjected to harsher resentencing as a consequence of such motivation would be most directly injured, but the wrong would extend as well to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation. Thus, the Court held that fundamental notions of fairness embodied within the concept of due process required that convicted defendants be "freed of apprehension of such a retaliatory motivation."

Chaffin, 412 U.S. at 24-25.

If the rule Texas wants becomes law, look at the situation in which a defendant who must decide whether to appeal his case will be placed. If he succeeds and gets a new trial it is entirely possible that the State may prove a slightly stronger case against him the second time. Then, this "stronger" (but not new) testimony might be seized upon by the judge to justify a sentence increase. Perhaps it will be said that he showed no remorse at the second trial. Perhaps it will be claimed that the evidence showed that he was a worse person than thought before. Would a defendant, even one whose first trial was fundamentally flawed and whose rights had been egregiously violated, think twice before deciding to appeal? Certainly.

If the rule Texas wants becomes law the decision to appeal will become a hard one. Few defendants will want to gamble on whether a few additional details will be brought out at a retrial and used against them.

The social consequences of such a situation would be grave. Access to the courts would be impeded. Trial courts would make more errors. Appellate courts would make fewer decisions. The steady progress of the law would be slowed and the meaning of it lessened. The situation would be intolerable.

C. Adopting The Rule Texas Wants Is Not Necessary To Avoid Unjust Results.

Texas urges the Court to adopt the rule it advocates because it claims that if the Court does not then unjust results will occur.

The Solicitor General makes this argument forcefully in his amicus brief. He poses a hypothetical problem: suppose a defendant has been sentenced to a light punishment, perhaps even probation, as a first offender. He

appeals, wins, and gets a new trial. Before he is resentenced it is learned that he has been using an alias and in reality has a lengthy criminal record (Brief of Solicitor General, 26).

Amicus argues that unless the new rule Texas seeks is adopted this sort of defendant would be able to hide behind *Pearce*. Limiting his punishment to what he received at his first trial, it is said, would be unjust.

It would be. This kind of injustice, however, would not occur under present law. This is because the hypothetical defendant's continuing perjury as to the extent of his record would itself be an "event" occurring subsequent to his first trial. Under *Wasman*, the resentencing judge would be perfectly justified in increasing the sentence in such a situation.

The second hypothetical presents a harder problem.

In this case, the defendant is given a light sentence after the first trial because he is thought to have played only a minor role in the crime. On retrial, new evidence shows that he was a primary force behind it. (Brief of Solicitor General, 26).

This kind of case, as shown earlier, will occur infrequently. When it does, however, it presents a serious problem.

Amicus argues that unless the Court creates the rule Texas wants this sort of defendant will escape just punishment. Amicus is correct to some extent. Under present law, the resentencer in this kind of case would be forbidden to increase the sentence. The goal of rational sentencing—to mete out punishment which fits the offender (See *Williams* v. *New York*, 337 U.S. 241, 245 (1949)—would be frustrated in this rare instance. Certainly, to allow this

to happen in these limited situations would be to do an injustice.

But to create the rule urged by Texas would do a greater injustice. As shown above, allowing a sentencing court to use evidence adduced at the second trial alone as a justification for a stiffer sentence would be to resurrect the evils *Pearce* sought to bury. By returning the risk of vindictiveness to sentencing, the integrity of the entire trial process would be compromised. See *Michigan* v. *Payne*, 412 U.S. 47 (1973).

Countless defendants—many unfairly tried—would decide not to challenge their convictions since the new trial might afford a vindictive judge some justification for a sentence increase. *Chaffin*, 412 U.S. 24-25.

Trial courts, no longer subjected to appellate scrutiny, would err and err again. All the injustices *Pearce* sought to correct would return with a vengeance.

The Court must make a choice. It can retain existing law under *Pearce* and *Wasman* with the understanding that an occasional injustice might occur, or it can create the rule Texas wants and do a much greater injustice.

CONÇLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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September 1985

(4)

No. 84-1198

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS, PETITIONER

v.

SANFORD JAMES MCCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a presumption of vindictive sentencing attaches when the trial judge grants the defendant's motion for a new trial, the defendant elects to be sentenced by the judge, and the judge imposes a higher sentence than that imposed by the jury at the first trial.

2. Whether a presumption of vindictive sentencing can be rebutted by reliance for an increased sentence on new, objective information not known at the time of the first sentencing, but relating to events antedating that sentencing.

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INTEREST OF THE UNITED STATES

This case involves an interpretation of the due process holding of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), which generally applies to the federal judicial system. The first question concerns whether a presumption of vindictiveness should arise under the circumstances here. While the precise facts here cannot arise in the federal system because there is no provision for jury sentencing, the decision in this case can be expected to shed light on the more general question of the applicability of *Pearce* where the sentencing judge himself or herself grants a new trial. The second question presented here—what type of in-

formation can be used to rebut a presumption of vindictive resentencing—is fully applicable to the federal criminal justice system. Indeed, the United States recently briefed this issue in *Wasman* v. *United States*, No. 83-173 (July 3, 1984). Accordingly, the decision in this case is likely to have a significant impact on federal prosecutions.

STATEMENT

1. Following a jury trial, respondent was convicted of murder, in violation of Texas Penal Code Ann. § 19.02 (Vernon 1974). Pursuant to Tex. Stat. Ann. art. 37.07 (Vernon 1981 & Supp. 1985) (set forth at Pet. App. A19-A21), respondent elected to be sentenced by the same jury that decided his guilt. The jury imposed a sentence of 20 years' imprisonment. Thereafter, respondent filed a motion for a new trial, alleging improper jury argument and improper cross-examination by the prosecutor (J.A. 17-18). At a hearing on the motion, the State informed the judge that it did not oppose the motion and would agree to a new trial. The judge thereupon granted the motion.

In December 1980, respondent was retried before a new jury, but with the same judge presiding, and he was once again convicted of murder. This time, however, respondent elected to be sentenced by the trial judge, who imposed a sentence of 50 years' imprisonment.[1] Respondent moved for the entry of findings of fact explaining the increased sentence, which the judge did (Pet. App. A22-A24), although first expressing her conclusion that the prophylactic rule of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), was

[1] The maximum permissible sentence for non-capital murder in Texas is 99 years' imprisonment. Tex. Penal Code Ann. § 12.32 (Vernon 1974).

not applicable "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial" (Pet. App. A22).

The judge nevertheless went on to place on the record certain findings in the event the appellate court disagreed with her on the applicability of *Pearce*. She relied principally on "newly developed evidence" that was presented for the first time at the second trial. The judge specifically focused on the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Lee Brown, which "directly implicated the [respondent] in the commission of the murder in question and showed what part he played in committing the offense" (Pet. App. A22). The judge found that their testimony "shed new light upon the [respondent's] life, conduct, and his mental and moral propensities" and provided "insight as to * * * [respondent's] propensity to commit brutal crimes against persons and to constitute a future threat to society" (*id.* at A23). The judge also noted that she learned for the first time at the second trial that respondent had been released from prison only four months before the crime occurred (*ibid.*). The judge further observed that respondent had never exhibited any signs of remorse upon retrial and never "show[ed] this court any sign or intention of refraining from criminal conduct in the future" (*id.* at A24). In addition, the judge stated that she would have sentenced respondent to more than 20 years at the first trial had respondent not elected to be sentenced by the jury (*ibid.*).

2. The Court of Appeals for the Seventh Supreme Judicial District of Texas affirmed respondent's conviction but vacated his sentence, holding that the increase violated *North Carolina* v. *Pearce*, *supra* (Pet.

App. A1-A7). Distinguishing *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the court held that the increase in respondent's sentence at retrial gave rise to a presumption of vindictiveness because that sentence had been imposed by a judge who knew of the first sentence, rather than a jury. And the court ruled that the presumption was not rebutted by the judge's reliance on new information regarding respondent's conduct prior to the first trial because *Pearce* states that the increase must be based on "conduct on the part of the defendant occurring *after* the time of the original sentencing proceeding" (395 U.S. at 726 (emphasis added)). See Pet. App. A4-A7.[2] Accordingly, the court resentenced respondent to 20 years' imprisonment, the sentence imposed by the jury at the first trial (*id.* at A7). On motion for rehearing, the court reaffirmed its holding that a presumption of vindictiveness applied in this case, deeming it immaterial that respondent's new trial was granted by the trial judge herself, rather than on appeal. *Id.* at A8-A9.

[2] The court added, however, that it viewed the cited language in *Pearce* as unduly restrictive and that it led to an unjust result here by requiring vacation of what was in fact a non-vindictive, appropriate sentence (Pet. App. A7 n.2):

> This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant.

3. The Texas Court of Criminal Appeals granted review on its own motion to determine the authority of the court below to reform respondent's sentence. The court concluded that, as a matter of procedure, the Court of Appeals should not have reformed the sentence, but instead it should have remanded the case to the trial court for resentencing. The court did not question, however, the holding of the lower court that respondent's increased sentence violated his right to due process. Pet. App. A10-A11.

On the State's motion for rehearing, the Court of Criminal Appeals addressed the question whether vindictiveness should be presumed "where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial" (Pet. App. A12). The court concluded that "the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (Pet. App. A13-A14 (footnote omitted)). In so ruling, the court explained that the reasons given in *Chaffin* v. *Stynchcombe*, 412 U.S. at 26-27, for excluding jury sentencing from the *Pearce* rule were not applicable here (Pet. App. A15-A16).[3] The court added that it considered it irrele-

[3] This Court identified three factors in *Chaffin* that distinguished jury sentencing from *Pearce*. Looking to those factors, the court below reasoned (Pet. App. A16): (1) unlike the ignorant jury in *Chaffin*, the trial judge here knew what sentence had been imposed at the first trial; (2) unlike *Chaffin*, "the second sentence [here] was in fact 'meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required' a new trial" (quoting *Chaffin*, 412 U.S. at 27); and (3) unlike the

vant that respondent could have chosen to be sentenced by a jury and in fact had done so at his first trial, rejecting the State's contention that the *Pearce* presumption does not attach when a different sentencing authority assesses the punishment on retrial.

SUMMARY OF ARGUMENT

I.

In the circumstances presented here, a presumption that the sentence increase was motivated by vindictiveness is not rational. In contrast to the prototypical *Pearce* situation, where the sentencing judge is reversed on appeal because a different court has found error in the handling of the first trial, the new trial here was ordered by the sentencing judge herself. Therefore, the retrial is neither a personal nor an institutional affront to the sentencing court. The sentencing court is not being directed "to do over what it thought it had already done correctly" (*Colten* v. *Kentucky*, 407 U.S. 104, 116-117 (1972)), nor is there any basis for a motivation of "self-vindication" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27 (1973)). In short, there is simply no reason to presume that the sentencer feels any resentment towards the defendant for obtaining a new trial when the sentencer has already gone on record as finding that a new trial is fully justified. Hence, there is no reason to anticipate that the sentencer would act vindictively in sentencing the defendant after the retrial.

Moreover, the first sentence here was imposed by a jury, not by the judge who imposed the "increased" sentence after a retrial. Where both sentences are

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jury in *Chaffin*, the judge here was likely to be sensitive to the institutional interests that might be served by discouraging meritless appeals through increased sentences.

imposed by the same sentencing authority one would normally expect that, in the absence of changed circumstances, the sentence after a retrial will be the same as it was following the first trial. If it is instead more severe, a rebuttable presumption of vindictiveness makes considerable sense. If there are valid reasons for the change in sentence, the judge should be able to state them; in the absence of a stated justification, it is not unreasonable to presume that the motivation for the sentence increase is an impermissible one—retaliation for the defendant's exercise of a procedural right. When the second sentencer is different from the first, however, the most likely explanation for the sentence disparity is different sentencing philosophies of the two sentencers. There has not really been any sentence "increase," just a different sentence. In this situation, it cannot be said that the mere fact of a sentence increase poses a "realistic likelihood of vindictiveness" (*United States* v. *Goodwin*, 457 U.S. 368, 384 (1982) (internal quotations omitted)) that ought to give rise to a presumption of vindictiveness.

Finally, even if a reasonable apprehension of vindictiveness could exist and justify application of the *Pearce* presumption in the normal case, in which the second sentencing is by a different judge, such an approach is entirely inappropriate here because the defendant deliberately chose to place himself in the position of which he now complains; he could have elected to be sentenced by the jury, as he was at his first trial, and thereby eliminated any possibility of vindictive sentencing.

II.

Assuming arguendo that a presumption of vindictiveness is appropriate in this case, the court below erred in holding that the presumption could be re-

butted only by reliance on events that occurred subsequent to the first sentencing proceeding. While this rule finds support in dictum in *Pearce*, it bears no logical relationship to the policies underlying the *Pearce* rule. The requirements of due process plainly ought to be satisfied if the reasons given by the judge for the sentence increase persuade a reviewing court that there was a sound, non-vindictive basis for the sentence. It is not apparent why these reasons cannot include new information that comes to light for the first time at the retrial but relates to conduct of the defendant that occurred prior to the first trial—for example, the discovery that the defendant has an extensive criminal record.

ARGUMENT

THE TEXAS COURT ERRED IN RULING THAT THE INCREASED SENTENCE ON RETRIAL IN THIS CASE VIOLATED DUE PROCESS

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court addressed the due process implications of the possibility that defendants who successfully appeal or collaterally attack their convictions may receive more severe sentences after retrial as a punishment for exercising their rights. The Court concluded that when a defendant receives a higher sentence upon reconviction after a successful appeal than he received after his first trial, the danger that the increased sentence is a product of vindictiveness (*i.e.*, intended to retaliate against him for the successful exercise of his procedural rights or to discourage the exercise of those rights by others in the future) is sufficiently high that a prophylactic rule is appropriate to eliminate such vindictiveness. Accordingly, the Court held that when a defendant successfully

challenges his conviction on appeal or collateral attack, due process requires that a presumption of vindictiveness attach to a more severe sentence at the second trial and that such a sentence is invalid unless the sentencing judge places on the record adequate reasons that objectively justify the sentence increase. 395 U.S. at 723, 726. On several occasions since *Pearce* the Court has confronted different sorts of situations involving either sentence increases or increases in charges by the prosecutor and has considered the question whether those situations present a sufficient " 'realistic likelihood of "vindictiveness" ' " (*United States* v. *Goodwin*, 457 U.S. 368, 384 (1982), quoting *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974)) that a presumption of vindictiveness is warranted.

In this case the court below erred in two distinct respects. First, the possibility that an increased sentence in the situation presented here is the product of vindictiveness is so remote that a presumption of vindictiveness plainly is not warranted. Second, assuming that such a presumption were applicable, the court took an unduly narrow view of the type of information that may be relied upon by the sentencing judge to justify an increased sentence and therefore rebut the presumption of vindictiveness.

I. IT IS INAPPROPRIATE TO PRESUME THAT THE INCREASED SENTENCE ON RETRIAL IN THIS CASE WAS A PRODUCT OF VINDICTIVENESS

A. When It Is The Sentencing Judge Who Grants The Retrial, There Is No Reason To Presume That The Burden Of Retrial Will Impel The Judge To Sentence Vindictively

While *Pearce* itself does not shed much light on the matter, subsequent decisions have identified considerations that are relevant in assessing whether there is

a sufficient likelihood of retaliatory motivation in a given context to warrant a presumption of vindictiveness. These considerations, while supporting the existence of such a presumption in the traditional *Pearce* context of retrial following reversal on appeal, strongly suggest that there is no reason to presume vindictiveness in the situation presented here and hence that a prophylactic rule barring an increased sentence on retrial is not appropriate.

In *Colten* v. *Kentucky*, 407 U.S. 104, 112-119 (1972), the Court declined to extend the *Pearce* presumption to the context of a two-tier prosecution system in which the defendant could appeal automatically from a conviction in an inferior court and obtain a new trial in a court of general jurisdiction. The Court explained that *Pearce* did not hold that the mere fact of reconviction and a higher sentence gave rise to a presumption of vindictiveness, and it concluded that there was no inherent danger that a higher sentence at the second stage of a two-tier prosecution would be motivated by vindictiveness. The Court noted that, in contrast to *Pearce*, the court imposing the higher sentence was a new one, "not the court that is asked to do over what it thought it had already done correctly" (407 U.S. at 116-117).

In *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the Court held that the *Pearce* presumption was not applicable even in the traditional setting of a retrial following reversal on appeal, if the higher sentence was imposed by a jury, because jury resentencing posed no "real threat of vindictiveness" (*id.* at 28, footnote omitted).[4] The Court explained that the

[4] In *Pearce*, the Court summarized its holding as requiring a statement of reasons "whenever a judge imposes a more severe sentence upon a defendant after *a new trial*" (395 U.S. at 726 (emphasis added)). Both *Colten* and *Chaffin* make

"first prerequisite for the imposition of a retaliatory penalty"—knowledge of the prior sentence—was absent in the jury resentencing context (*id.* at 26). The Court also identified two other factors present in *Pearce* whose absence in the jury sentencing context further diminished the possibility of vindictiveness in the latter case. Where "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction," the sentencer has "no personal stake in the prior conviction and no motivation to engage in self-vindication" (*id.* at 27). And "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals" (*ibid.*; footnote omitted). In *United States* v. *Goodwin*, 457 U.S. at 383, the Court reemphasized the significance of these two factors in holding that a presumption of vindictiveness is not warranted when the prosecutor increases the charges after a defendant elects to be tried by a jury. See generally *Wasman* v. *United States*, No. 83-173 (July 3, 1984), slip op. 6-9.

Upon examination of these considerations, it is apparent that a presumption of vindictive increase of sentence should not attach when the retrial is ordered by the sentencing judge. In this situation the sen-

clear that this is an overly broad statement of the Court's holding. *Pearce* imposes a prophylactic rule in the particular situation presented to the Court there or a closely analogous one—resentencing by the same judge at a retrial following reversal on appeal or collateral attack. In other situations where a new trial is held, such as in *Colten* and *Chaffin*, the rule may not apply, depending upon the likelihood in the particular situation that an increased sentence would be the product of vindictiveness.

tencing court is not being asked "to do over what it thought it had already done correctly" (*Colten*, 407 U.S. at 116-117); to the contrary, that court has already gone on record as agreeing with the defendant that a retrial is appropriate. The sentencing judge has not been criticized, even implicitly, by another court for his handling of the first trial; he has suffered no personal rebuke and accordingly, "unlike the judge who has been reversed," he has "no motivation to engage in self-vindication" (*Chaffin*, 412 U.S. at 27).[5] The judge cannot feel unjustly burdened by having to retry the case when he himself has ordered the retrial; he could simply have denied the motion for a new trial if he believed the defendant was not entitled to it. By the same token, there is no "institutional interest[] [in] * * * discouraging * * * meritless appeals" (*ibid.*; footnote omitted) that might motivate an increased sentence when the sentencing judge has already concluded that the appeal (or new trial motion) in fact does have merit. Finally, the sentencing judge's willingness to grant the defendant's request for relief strongly indicates that he is disposed to treat the defendant fairly, and there is no reason to presume that he will rely upon impermissible, vindictive factors in imposing sentence.

Moreover, apart from the fact that the sentencing judge himself has recognized the need for a retrial, it is relevant that the burden imposed upon the judicial system by the grant of a new trial is usually con-

[5] Where the basis of the defendant's request for a retrial is alleged excesses by the prosecutor, as in this case, rather than an erroneous ruling by the presiding judge, it is even less likely that the judge will treat the retrial as a personal affront and be motivated to use his sentencing power to punish the defendant.

siderably less than when a conviction is reversed on appeal as in *Pearce*. In most cases where a new trial is granted by the presiding judge, only a short time has elapsed since the conclusion of the first trial.[6] The case will still be fresh in the minds of the court and the parties, and the burden on the judicial system system as a whole, with respect to such matters as recalling witnesses and reassembling evidence, is not as severe as when a case is reversed on appeal long after the trial. In short, "the institutional bias against the retrial of a decided question that supported the decisions in *Pearce* and *Blackledge*" (*Goodwin*, 457 U.S. at 383) is not nearly as strong in this context.

Thus, with one exception, every relevant consideration suggests that the situation presented here is like *Chaffin*, and unlike *Pearce*, and therefore that it is not appropriate to apply a presumption of vindictiveness to a sentence increase on retrial. It is true that in this case, unlike *Chaffin*, the judge who imposed the more severe sentence was aware of the sentence imposed at the first trial. But it is manifest that this fact alone does not justify a presumption of vindictiveness. The Court has correctly characterized such knowledge of the prior sentence as a "prerequisite" for a vindictive sentence increase (*Chaffin*, 412 U.S. at 26). A judge who wants to impose a higher sentence on retrial in order to punish a defendant for taking an appeal or discourage others from doing so

[6] For example, under Fed R. Crim. P. 33, new trial motions must be filed within seven days of the verdict, unless the motion alleges the discovery of exculpatory evidence, in which case the motion must be filed within two years of the final judgment. In the instant case, respondent's first trial took place in September 1980 and the retrial took place in December 1980 (Pet. App. A2).

needs to know what the original sentence was. But granting that knowledge of severity of the original sentence gives the sentencer the *opportunity* to increase the sentence for vindictive reasons, this manifestly does not establish a sufficient basis for the imposition of a presumption of vindictiveness (see *Goodwin*, 457 U.S. at 384). The mere fact of knowledge of the first sentence sheds no light at all on the critical question—whether there is a reasonable likelihood that an increased sentence is vindictively motivated. Indeed, the Court has made it plain that knowledge of the first sentence does not alone provide a basis for establishing a presumption of vindictiveness. In *Colten*, the sentencing judge was aware of the first sentence when he imposed a higher sentence. See 407 U.S. at 118 n.14. And, of course, prosecutors who increase charges are aware of the level of the original charges, but their actions are not generally presumed to be motivated by vindictiveness. See *Goodwin*; *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). There is simply no reason to expect that a judge who grants a defendant a new trial will use his sentencing power to punish the defendant for exercising his rights; accordingly, the *Pearce* presumption of vindictiveness should not apply in that context.[7]

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[7] The fact that no presumption of vindictiveness attaches in the generality of cases does not "foreclose the possibility that a defendant in an appropriate case might prove objectively" that a sentence increase was motivated by a desire to punish him for exercising his rights. See *Goodwin*, 457 U.S. at 384. For example, if the same judge who sentenced a defendant at his first trial sentenced him to a substantially higher sentence after a retrial, with no apparent change in circumstances or other justification, that would likely provide an evidentiary basis for a finding of vindictiveness; that is not the same as *presuming* vindictiveness from the mere fact of an increase, without any evidentiary basis.

B. The Prophylactic Rule Of *Pearce* Should Not Apply Where The First Sentence Is Imposed By A Jury And The Defendant Elects To Have His Sentence At Retrial Imposed By The Judge

1. The Texas Court of Criminal Appeals rejected the State's argument that *Pearce* was inapplicable here because a different sentencing authority assessed the punishment on retrial. The court correctly noted that in *Pearce* itself different judges had presided over the two trials. See Pet. App. A17-A18; see also *Chaffin*, 412 U.S. at 41 n.4 (Marshall, J., dissenting). And the lower courts generally have taken *Pearce* to mean that the prophylactic rule applies even where the second sentence is imposed by a different judge. See, *e.g.*, *United States* v. *Whitley*, 759 F.2d 327, 329-330 (4th Cir. 1985) (en banc), petition for cert. pending, No. 84-6980; *United States* v. *Hawthorne*, 532 F.2d 318, 323 (3d Cir. 1976); *United States* v. *Floyd*, 519 F.2d 1031, 1034-1035 (5th Cir. 1975). The Court in *Pearce*, however, did not mention that the second sentence was imposed by a different judge, and it clearly did not focus on that fact. See *Hardwick* v. *Doolittle*, 558 F.2d 292, 299 & n.3 (5th Cir. 1977). In light of the Court's subsequent elucidation of the considerations underlying *Pearce*, it seems questionable at best for the prophylactic rule to apply when the judge who imposes the more severe sentence after retrial is not the judge who imposed the original sentence.

The realistic likelihood of vindictiveness that gave rise to a presumption in *Pearce* derives in large part from the personal stake that a judge has in the pro-

ceedings that have been reversed on appeal. See *Goodwin*, 457 U.S. at 383; *Chaffin*, 412 U.S. at 27. When the authority that imposes the higher sentence is different from the earlier sentencer, that personal stake with its accompanying stimulus to retaliatory motivation is absent, and hence the likelihood that the sentence is the product of vindictiveness is considerably diminished. See *Thigpen* v. *Roberts*, No. 82-1330 (June 27, 1984), slip op. 4; *Colten*, 407 U.S. at 116-117.

More important, the fact that the second sentencer is different provides a logical, non-vindictive reason for the difference in sentence. When a judge imposes one sentence on a defendant and then later, after a successful appeal and a second trial, imposes a higher sentence on the same defendant convicted of the same offense, the result is a peculiar one that begs for an explanation. Two possible explanations for the sentence increase come to mind: either (1) the judge has increased the sentence to retaliate for the defendant's exercise of his right to appeal and/or to discourage such appeals in the future; or (2) new information has come to light subsequent to the first sentencing proceeding that in the judge's view warrants a more severe sentence. In this situation, the prophylactic rule of *Pearce* makes considerable sense. The sentence is presumed to be motivated by vindictiveness, but the judge may rebut the presumption of vindictiveness by placing on the record rational, nonvindictive, newly learned reasons for increasing the sentence.

When the second sentence is imposed by a different judge, however, the situation is completely different. Judges are invested with wide discretion in sentencing, and the process is inherently quite subjective.

See, *e.g.*, *Wasman* v. *United States*, slip op. 4; *Williams* v. *Illinois*, 399 U.S. 235, 243 (1970). The most logical explanation for the sentence disparity is simply the different sentencing theories or approaches of the respective judges. The higher sentence imposed by the second judge most likely indicates that that judge would have given a more severe sentence had he or she presided at the first trial as well; this turn of events surely redounds to the detriment of the defendant, but that does not make the second sentence vindictive or in any way violative of due process. The sentence has not been "increased" in the sense that it is when the sentencing authority remains the same; the sentences are simply different. Generally "it no more follows that [the second] sentence is a vindictive penalty for seeking a [new] trial than that [the first judge] imposed a lenient penalty." *Colten*, 407 U.S. at 117.[8]

This is not to say that there is no possibility that a new sentencer might impose a more severe sentence at retrial because of a desire to punish a defendant for taking an appeal. There are institutional interests in limiting the retrial of apparently settled

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[8] In this case the sentencing judge stated her belief that the 20-year sentence imposed by the jury at the first trial was unduly lenient (Pet. App. A24). The circumstances suggest that this view was a reasonable one. Petitioner's brief reveals (at 6 n.1) that each of the other two participants in this brutal murder was sentenced to a 50-year term of imprisonment. Indeed, the State apparently was willing to risk its conviction and acquiesce in a new trial because of its view that the first sentence was unduly lenient and that a second sentencing authority would be likely to impose a higher sentence (Pet. App. A4). (At that time, of course, the State and the judge did not know that respondent would elect to be sentenced by the judge rather than by the second jury.)

issues that may transcend the personal involvement of particular judges. See *Goodwin*, 457 U.S. at 383. But that possibility existed in *Colten* and was not found sufficient to support the presumption of vindictiveness. This is because where the second sentencer is different, it is manifest that such a vindictive motivation is a considerably less likely explanation for the sentencing disparity than the simple fact that different judges have different attitudes towards sentencing. Indulging a presumption of vindictiveness when a new sentencer imposes a more severe sentence on retrial designates as the reason for the sentence, unless rebutted, what is in fact an unlikely explanation. Therefore, applying the prophylactic rule of *Pearce* in this situation appears quite inconsistent with the Court's established principle that " 'the Due Process Clause is not offended by all possibilities of increased punishment upon retrial * * *, but only by those that pose a realistic likelihood of "vindictiveness." ' " *Goodwin*, 457 U.S. at 375 (quoting *Blackledge* v. *Perry*, 417 U.S. at 27). See especially *United States* v. *Hawthorne*, *supra*; *United States* v. *Floyd*, *supra* (*Pearce* presumption applied even though second sentencing judge deliberately insulated himself from knowledge of prior proceedings).

2. In any event, even if it were deemed generally appropriate to apply the prophylactic rule of *Pearce* despite the fact that the higher sentence has been imposed by a different sentencing authority, it is not appropriate to do so on the facts of this case. To the extent respondent was exposed to any danger of vindictive sentencing it was solely as a result of his choice of sentencer. Respondent could have avoided any possibility of vindictive sentencing simply by choosing to be sentenced by the jury, as he had done

at the first trial. See *Chaffin* v. *Stynchcombe*, *supra*. Indeed, under the Texas system allowing jury sentencing, the *Pearce* rule is not as a general matter necessary to protect defendants in respondent's position against any "chilling effect" on their right to seek a new trial that might arguably be caused by the possibility of vindictive sentencing;[9] the defendant can eliminate any such risk by electing jury sentencing.

In fact, it seems quite likely that respondent chose to be sentenced by the judge at his retrial precisely because he feared that a jury might impose—for wholly legitimate, non-vindictive reasons—a more severe sentence on him than he had received the first time, and he believed that, by choosing to be sentenced by the judge, *Pearce* would preserve his lenient sentence as a maximum. This strategy perverts the due process protection recognized in *Pearce* by using it as

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[9] The Court has stated that the *Pearce* rule is designed to protect against both actual vindictiveness and the reasonable apprehension of vindictiveness that might deter a defendant's exercise of his right to challenge his conviction. *Blackledge* v. *Perry*, 417 U.S. at 28. At the same time, it is clear that *Pearce* does not protect against the "chilling effect" that may result simply from the possibility of an increased sentence based on non-vindictive reasons. See *Chaffin*, 412 U.S. at 29-35. While there has been some disagreement about the scope of the protection against the reasonable apprehension of vindictiveness (see generally *Wasman* v. *United States*, *supra*), it seems apparent that the two protections merge, as a practical matter, when assessing whether a presumption of vindictiveness is warranted in a particular situation. If a situation does not present a "realistic likelihood of vindictiveness" (see *Goodwin*, 457 U.S. at 384), then there is little danger of either actual vindictiveness or the reasonable apprehension of vindictiveness, and *Pearce* does not require the imposition of a prophylactic rule presuming vindictiveness.

a sword rather than a shield. See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 9. The *Pearce* rule is designed to protect defendants against vindictive resentencing, and it should not be applied in a case like this, where it would serve no function other than to secure a windfall for the defendant in the form of an unduly light sentence.

In sum, under the circumstances here, where the judge who imposed the more severe sentence on retrial did not impose the earlier, more lenient, sentence, and where the second sentencing judge herself granted the new trial motion, the possibility that the more severe sentence was motivated by vindictiveness is far too remote to support a rational presumption that the sentence increase was in fact vindictive. Such a rule would seriously undermine the policy of rational sentencing, which depends on the sentencing authority's ability to consider all relevant information and impose the sentence deemed most appropriate in light of that information (see *Wasman* v. *United States*, slip op. 4; *Williams* v. *New York*, 337 U.S. 241, 247 (1949)), while not advancing at all the policies of the Due Process Clause.

II. A PRESUMPTION OF VINDICTIVENESS MAY BE REBUTTED IF THE INCREASED SENTENCE IS REASONABLY BASED ON NEW, OBJECTIVE INFORMATION NOT KNOWN AT THE TIME OF THE FIRST SENTENCING

Assuming arguendo that a presumption of vindictiveness is appropriate in this case, the question arises whether the reasons given by the judge for the sentence increase suffice to rebut that presumption. The court below held that the reasons given here—relating to new information that had come to light in connection with the second trial—could not be considered

because *Pearce* permits reliance only on information concerning events taking place after the first trial (Pet. App. A13-A14; see also *id.* at A6-A7). There is undoubtedly support for this position in the language of *Pearce*, which stated in its summary of the prophylactic rule that the presumption could be rebutted only by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726) and earlier referred to "events subsequent to the first trial" (*id.* at 723). In our view, however, *Pearce* should not be applied to establish a broad, inflexible rule barring reliance upon newly learned information that relates to events that occurred prior to the first sentencing proceeding. To the extent that *Pearce* sets forth such an inflexible approach, the rule is pure dictum that was not given adequate consideration by the Court. In fact, such an inflexible rule is at odds with the reasoning underlying *Pearce* and its progeny, and we submit that the broad limitation stated in *Pearce* and relied upon by the court below ought not to be uncritically accepted here.

A. It cannot be doubted that the broad statement in *Pearce* restricting the information that may be used to justify a higher sentence on retrial, on which the court below relied, was pure dictum.[10] In neither

[10] Three of the eight Justices clearly joined in this dictum. Justice White, concurring in part, specifically noted his disagreement with it, stating that, in his view, due process permitted a sentence increase on the basis of "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding" (395 U.S. at 751). Justices Douglas, Marshall, and Harlan concurred in part on the ground that the Double Jeopardy Clause prohibited any increase in sentence on retrial (*id.* at 726-737; *id.* at 744-

Pearce nor its companion case did the State come forth with any reason to justify the sentence increase (see 395 U.S. at 726); hence, the presumption of vindictiveness that the Court held applicable necessarily required overturning the increased sentences, even if there were *no* limitation on the type of reasons that legitimately could rebut the presumption. Moreover, it is surely accurate to say that in *Pearce* the "possible bearing [of the prophylactic rule as stated] on all other cases [was not] completely investigated." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 400 (1821). None of the briefs in the cases addressed the question of dispelling a presumption of vindictiveness.[11] Thus, in formulating the standard set forth in *Pearce*, the Court was completely without the "sharpen[ing of] the presentation of issues" provided by the adversary process, "upon which the court

751). These Justices did not specifically discuss the appropriate parameters of the Court's due process holding, although Justice Harlan expressed some doubt concerning the merit of a distinction between events occurring after the first trial and prior misconduct subsequently discovered (*id.* at 750 n.8). Justice Black dissented from the Court's due process holding in *Pearce*, stating that he did not believe the Constitution required any statement of reasons by the second sentencing court (*id.* at 740-743).

[11] The focus of the litigation in *Pearce* was on the propriety of imposing an increased sentence at all. The States argued that there was no constitutional bar to such an increase. The respondents argued that in no circumstances could a sentence be increased on retrial; this argument was based primarily on the grounds that any increase would violate double jeopardy or unconstitutionally burden the right to appeal. See *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967). The parties did not focus on the possibility of a middle ground, namely, that a sentence increase would be permissible, but only under certain circumstances.

so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 28 & n.28 (noting that jurisdictional question implicitly decided in other cases remained open where not briefed or discussed in those cases); *Stone* v. *Powell*, 428 U.S. 465, 481 (1976). In these circumstances, it would run contrary to the Court's normal principles of decision to accept uncritically, in a case where the issue is actually presented for decision, the *Pearce* formulation that places a temporal limitation on the type of evidence that may be considered by the sentencing judge. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) at 399.

Indeed, this Court's own subsequent treatment of the *Pearce* formulation indicates that the language of that opinion is not necessarily to be construed inflexibly. In *Goodwin*, the Court, rather than repeating *Pearce*'s restrictive formulation, stated that the presumption of vindictiveness "may be overcome only by objective information in the record justifying the increased sentence." 457 U.S. at 374 (footnote omitted).[12] And in *Wasman* the Court *held* that the prophylactic rule of *Pearce* should not be interpreted as broadly as it is stated. Despite the fact that the *Pearce* formulation states that only "conduct on the part of the defendant" occurring after the first trial can be considered in dispelling the presumption of

[12] See also 457 U.S. at 376 n.8 (noting that analogous *Perry* presumption of prosecutorial vindictiveness can be "overcome by objective evidence justifying the prosecutor's action"); *id.* at 386 (Blackmun, J., concurring in the judgment) ("prosecutor adequately explains an increased charge by pointing to objective information that he could not reasonably have been aware of at the time charges were initially filed").

vindictiveness (395 U.S. at 726), the Court held unanimously that relevant information that did not fit that description (entry of a conviction) could in fact be relied upon to increase a sentence. The Court found it unnecessary to reach our argument that *Pearce* similarly should not impose a rigid temporal limitation on the consideration of relevant sentencing information, but it apparently regarded the question as an open one. See *Wasman*, slip op. 13 n.*.[13] Accordingly, this issue is not foreclosed by *Pearce*.

B. The inflexible rule applied by the court below does not logically advance the policies underlying *Pearce*. Under the rationale of *Pearce* and its progeny, the requirements of due process ought to be satisfied if the reasons given by the judge for the sentence increase provide a sound, non-vindictive basis for any increased severity. The existence of a newly learned, objective justification for a more severe sentence would demonstrate to a reviewing court that the sentencing court likely did not retaliate against the defendant for the exercise of a legal right and hence would undercut the validity of any presumption of vindictiveness. In particular, the requirement that the sentencing court's reasons be placed on the record subject to scrutiny by a reviewing court effectively eliminates the risk that the increased sentence was motivated, even subconsciously (see *Goodwin*, 457 U.S. at 377), by a desire to punish the de-

[13] By the same token, in *Michigan* v. *Payne*, 412 U.S. 47 (1973), the State argued that the reasons given by the judge for increasing the sentence on retrial, which related primarily to new evidence concerning the crime brought out at the second trial rather than events that happened after the trial (see *id.* at 48 & n.1), satisfied *Pearce*. While the Court did not reach this contention because of its retroactivity holding, it apparently considered it to be an open question (*id.* at 49).

fendant for causing a retrial. Therefore, it would seem that the Constitution should permit any objective factual information not available at the first sentencing proceeding to be set forth as a justification for a higher sentence on retrial. Cf. *Pearce*, 395 U.S. at 751 (White, J., concurring).[14] This surely is consonant with the long-accepted proposition that the judge's selection of an appropriate sentence is enhanced by "the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. at 247 (footnote omitted).

The theoretical basis underlying the presumption of vindictiveness imposed in *Pearce* does not in any way justify placing a temporal limitation on the type of information that the judge may consider. No logical reason that advances the goal of insuring against vindictive resentencing supports a distinction between

[14] We recognize that not every factor that might conceivably have been taken into account at the first sentencing provides a sufficient justification for a sentence increase, thereby dispelling any presumption of vindictiveness that attaches to a sentence increase. In many cases, there will be some relevant information adduced at the second proceeding that was not available at the first, but the information will not necessarily be of sufficient importance to justify a sentence increase. Because it is possible that a judge who does in fact increase a sentence for vindictive reasons would be able to defeat the protection of *Pearce* by hiding behind an assertion that such new information justified the increased sentence, it is appropriate that a sentence increase where the *Pearce* rule applies should be subject to exacting appellate review even though an ordinary sentence would not be. The defendant should be entitled to argue on appeal that the reasons given do not reasonably justify the sentence increase and therefore that the sentence increase lacks "'constitutional legitimacy.'" *Wasman*, slip op. 5 (quoting *Goodwin*, 457 U.S. at 374).

events that actually occur after the first sentencing proceeding and events that occur earlier but are not discovered until afterward. As the Court said in *Wasman*, "[e]ven without a limitation on the type of factual information that may be considered, the requirement that the sentencing authority * * * detail the reasons for an increased sentence * * * enables appellate courts to ensure that a nonvindictive rationale supports the increase" (slip op. 12).

Indeed, application of the limitation set forth in *Pearce* can lead to absurd results that could not possibly have been intended by the Court. Suppose, for example, that a defendant is convicted of burglary, a non-violent, and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender. Indeed, it is conceivable that a recidivist statute would *require* that he be given a higher sentence because of the prior convictions. Similarly, if a defendant is given a fairly light sentence for conspiracy to murder because he is thought to have played a relatively minor role in the conspiracy, and then at a retrial new evidence shows that he in fact was the primary force behind the conspiracy, it is surely appropriate that he receive a more severe sentence at the retrial. It cannot seriously be doubted

that in these hypothetical situations any presumption of vindictiveness that arises from a more severe sentence at retrial is convincingly dispelled. Due process does not prevent the imposition of such a sentence.[15]

In sum, there is no relationship between the likelihood of judicial vindictive sentencing and the date of the events relied upon as a basis for imposing a more severe penalty at retrial. As long as the judge identifies on the record facts that were not known at the first sentencing proceeding and that bear on the defendant's culpability or his propensity to commit crime, the judge should be able to select a sentence that takes into account the new information, even if it is more severe than the first sentence. That is an example of commendable, rational sentencing, not unconstitutional, vindictive sentencing.

Therefore, the broad rule applied by the court below to invalidate the sentence increase in this case—namely, that a judge sentencing after a retrial can never justify imposition of a more severe sentence by relying on new information relating to events that took place prior to the first sentencing proceeding—is simply wrong. In the event the Court concludes that a presumption of vindictiveness is warranted in the situation presented here (but see Part I, *supra*), the case should be remanded to the Texas court to consider whether the factors identified by the sentencing judge reasonably justify the sentence increase.

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[15] Significantly, several courts that anticipated this Court's decision in *Pearce* and found due process constraints on the imposition of an increased sentence after a retrial did not hold that a legitimate explanation for such a sentence was restricted to events occurring after the first trial. In *United States* v. *Coke*, 404 F.2d 836 (1968) (en banc), the Second Circuit in-

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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voked its supervisory power to establish a rule requiring a statement of reasons for an increased sentence at retrial. The court noted, however, that these reasons could be based upon newly discovered evidence relating to earlier events, for example, new information that showed that the defendant played a more significant role in the crime than first supposed. See *id.* at 842-843, 845-846. The court explained that "[a] defendant has no vested right in an inadequate record, at least when the inadequacy results from factors beyond the prosecution's control." *Id.* at 846. Similarly, in the companion case to *Pearce*, the district court vacated the unexplained increased sentence imposed at retrial as a violation of due process. The court stated, however, that a higher sentence would be permissible so long as "there is recorded in the court record some legal justification for it." *Rice* v. *Simpson*, 274 F. Supp. 116, 121 (M.D. Ala. 1967) (footnote omitted), aff'd, 396 F.2d 499 (5th Cir. 1968), aff'd, 395 U.S. 711 (1969). See also *United States* v. *White*, 382 F.2d 445, 449-450 (7th Cir. 1967), cert. denied, 389 U.S. 1052 (1968).

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